Supreme Court, U.S.
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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

OJAVAN INVESTORS, INC. et al.,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where owners of lots subject to restrictive covenants are served with a "cease and desist" order by the California Coastal Commission that purports to forbid sales of such lots, is it a denial of due process for California courts to hold that the lot owners are not entitled to defend on the merits against the Commission's charge of illegal conduct, on the grounds of statute of limitations bar, said to arise years earlier from the fact that the owners' predecessor in title (who recorded the covenants years earlier and had no standing to sue or any conceivable reason to sue) failed to sue to challenge permits issued on *other* properties (*see post*, pp. 3-5, 9-10)? Put another way, is it a denial of due process for the California courts to rule retroactively that the statute of limitations ran when there was neither an aggrieved party capable of bringing suit, nor any case or controversy to be litigated?

2. Where (on the facts appearing in Question 1) the California Supreme Court has held that the manner in which the restrictions on the subject properties were imposed was illegal, is it a denial of due process to deny nonetheless the right to litigate the merits of the Commission's plainly improper charge of illegality of the landowners' conduct based on the content of such illegal restrictions?

PARTIES TO THE PROCEEDING

Petitioners Ojavan Investors, Inc., Port Lemoore Corporation, P. U. Enterprises, Highland Group, Inc., Pakid Holdings, Inc., Malek Agency Ltd., Quelimane Co., and MTG Alliance Corp., all Oregon corporations, and Western Land Bank, a California corporation, were plaintiffs and appellants below. Respondent (defendant and respondent below) is the California Coastal Commission.

The complaint for relief also named as parties defendant Coastal Commission members and agents Thomas W. Gwyn, Steve MacElvaine, Lily Cervantes, Gary Giacomini, Madelyn Glickfeld, David Malcolm, Donald McInnis, Linda Moulton-Patterson, Bonnie Neely, Dorill Wright, Peter Douglas, Ralph Faust, John Bower and Nancy Cave.

RULE 29.1 LISTING

None of the corporate petitioners have any parent companies or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division Two.

OPINIONS BELOW

The June 22, 1994 opinion of the California Court of Appeal, Second Appellate District, Division Two, is reproduced herein as Petitioners' Appendix D1-18. The July 13, 1994 order from that same court denying rehearing (and slightly modifying the opinion) appears as Appendix B1-2. The June 30, 1994 order of that court authorizing the opinion for publication appears as Appendix C. The opinion, as modified on July 13, 1994, appears in the published reports at 26 Cal. App. 4th 516, 32 Cal. Rptr. 2d 103. The subsequent (September 8, 1994) order denying review by the California Supreme Court appears as Petitioners' Appendix A.

The January 1, 1993 judgment of the Los Angeles County Superior Court granting a general demurrer to Petitioners' petition for a writ of mandate in the action below appears as Appendix G1-2. The March 12, 1993 order of that same court denying the Petitioners' motion to reconsider or set aside that judgment is reproduced as Appendix F1-3. The March 15, 1993 order by a different judge of that same court granting a general demurrer to Petitioners' separate complaint in the action below appears as Appendix E1-2.

JURISDICTION

This is an action for deprivation of property without due process of law or just compensation in violation of the Fifth and Fourteenth amendments to the United States Constitution, and for violation of the Civil Rights Act. Below, Petitioners also raised a number of causes of action grounded in state law, which are not relevant to federal jurisdiction.

The judgment of the California Court of Appeal was entered on June 22, 1994, ordered published on June 30, 1994, and modified (without substantive change) July 13, 1994. The California Supreme Court denied review on September 8, 1994.

This court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> " . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law."

California Public Resources Code section 30801:

> "Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of

mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action has become final."

STATEMENT OF THE CASE

A. Background: How The Lots In Question Were Purportedly Restricted By Private Third Parties And Thereafter Acquired And Sold By Petitioners

Petitioners are real estate investment corporations owning lots (the lots) near the City of Malibu, California. Respondent California Coastal Commission was created by the California Coastal Act of 1976 (Public Resources Code section 30000 *et seq.*),[1] and is vested with review and permit power over the coastal zone.

On December 19, 1979 and on May 10, 1990, the Commission issued development permits to David Leanse and Larry Thorne (not parties to this controversy) for certain properties they owned, unrelated to the lots which are the subject of this action. (App. D4; 26 Cal. App. 4th at 521; CT-BC 212-41)[2] The Commission

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[1] All statutory citations hereinafter are to California codes.

[2] There were two appeals in this case (consolidated for briefing, argument and opinion), and thus there are two clerk's transcripts. To be consistent with the citation pattern below, CT-BS cites to the transcript in case No. BS 020 034 (the case instituted by a petition for a writ of mandate) and CT-BC cites to the transcript in case No. BC 056 929 (the case instituted by a complaint). On October 22, 1993, Petitioners filed an Application to Augment the record (granted in part). The exhibits to that Application are cited by exhibit and page number: for example Aug. 8:5 means page 5 of exhibit 8 to the application.

conditioned the permits (CT-BS 704-35) on participation by Leanse and Thorne in the Commission's extra-statutory "TDC" program. (CT-BS 17-22) As a condition for the issuance of a development permit, the TDC program coerces exactions in the form of relinquishment of development rights on other properties in the coastal zone "in perpetuity" (the Commission's words; CT-BS 32).

To fulfill the TDC requirements, permit applicants furnish consideration to an entity related to the Commission, the Santa Monica Mountains Conservancy Trust. Owners of unrelated property receive consideration for agreeing to restrict development on their properties (and sometimes, as here) to merging lots into larger parcels. When permits are granted, the unrelated properties are then "retired" from the possibility of development through the filing of documents entitled "Declaration of Restriction."[3] The permit grantee and the owner of the retired lots do not deal directly with each other. Here, the Commission and the Restoration Trust "matched" the Leanse and Thorne permits with the lots owned by Dan Z. Bochner and a related entity, Sophisticated Investments, Inc. (collectively "Bochner"). (App. D4; 26 Cal. App. 4th at 521) The Bochner lots were neither contiguous to the Leanse or Thorne properties (they are from 2½ to 8 miles distant) nor shoreline properties (they were 3 to 5 miles inland). (CT-BS 2-5, CT-BC 2-4, Aug 6:20)

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[3] In addition to the declaration of restriction, the TDC program requires the filing of a second document, an offer to dedicate a scenic easement (which basically ensures that the other land remain in its natural state). (CT-BS 20)

They just happened to be available for use in the TDC scheme.

Because of the logistics of the TDC program, the permits make no reference whatsoever to the lots.

The consideration Bochner received for agreeing to restrict and merge the lots was money and a favorable ad valorem tax treatment, fairly reflecting the diminution in value of the lots (the tax benefit never materialized), but was given no notice within the limitations period that his lots had been linked to the Leanse and Thorne permits. (*See* RB 28-30) Further, he was given no notice of the hearing on those permits. Moreover, he had no reason to challenge the restrictions since he bargained for them. The declarations, recorded in 1981, 1984 and 1990 by Bochner, are (except for the unusual lot-merger aspect), legally comparable to traditional private covenants running with the land. They contain false recitations (*see post* p. 20). They also brazenly recite that they were filed "in lieu of a more costly and lengthy map procedure pursuant to Government Code Section 66499.11 which would be undertaken but for costs and time delays." (CT-BC 36; *see also* CT-BC 28-47, 82-88) Though the Commission approved the declarations and affected the linkage, it was not a party to these private recording transactions.[4]

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[4] The private nature of the declarations is demonstrated by the fact that Bochner paid a recording fee. (CT BC 28, 34, 41, cf. CT-BS 1722) Public entities in California are exempt from recording fees. Gov't Code § 27383.

But, as later confirmed by the California Supreme Court in *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725 (1994), the merger was legally ineffectual *ab initio* because the mandatory requirements of the Subdivision Map Act were ignored. There is no basis in California law for substituting such a do-it-yourself "in lieu of" approach for statutory requirements. Further, the restrictions did not identify the land to be burdened and the land to be benefited with particularity; by settled California law this alone makes them unenforceable beyond the parties to the agreement. Civil Code § 1468. The lots retained their individual lot numbers and continued to be treated as individual lots by all state and local governmental agencies. They were assessed for ad valorem tax purposes and utility assessment purposes as individual lots. When Bochner later defaulted on tax payments, the county advertised that it would offer the lots for sale *as individual lots* at public auction. (CT-BS 6-7, CT-BC 5:22-6:12, Aug. 1:16-17) There was no objection by the Commission.[5] No effort was made by the Commission, Bochner, or any other party, to cure any of these deficiencies or perfect a legal merger of the lots under the Subdivision Map Act.

In short, the "covenants" were a conveyancer's bad dream; they were wholly invalid and of no legal effect.

On or about February 11, 1991, shortly before the county tax auction, Petitioners approached Bochner offering to pay off the tax delinquencies and buy a total of 54

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[5] In fact, Petitioners were prepared to show that the County had sold at least one of the Bochner lots as a separate parcel, and the Commission took no action against either the County or its vendee. It picks and chooses its cease and desist targets.

lots from him directly. (CT-BC 6:1-6) Bochner agreed to sell the lots, as individual lots, to Petitioners. Because of the pending tax delinquency sale, the sale to Petitioners was expedited: Petitioners obtained and relied upon title profiles (rather than full title reports), which did not disclose the restrictions or supposed mergers. Petitioners also relied on the fact that *the County was selling the lots as individual lots*. Hearing nothing from the Commission or anyone else suggestive of possible impropriety, Petitioners proceeded to sell the lots to third parties, and had sold approximately 18 by the time of the initial Commission interdiction. (App. D6; 26 Cal. App. 4th at 522)

B. Procedural History: Retroactive Interposition Of The Limitations Bar Precludes Petitioners From Defending Themselves On The Merits Against The Commission's Cease And Desist Order, Or From Showing The Illegality Of The Acts On Which The Commission Relies

About a year after sales commenced, the Commission contacted Petitioners, and told them to stop selling the lots. (CT-BS 1810, 1849)

After the Commission pointed out the restrictions to Petitioners, Petitioners' promotional literature promptly disclosed the restrictions. (App. D6-7; 26 Cal. App. 4th at 522; CT-BS 1852-88) The lots, consisting of approximately 6,000 to 13,000 square feet, sold for between $8,000 and $16,000 dollars – a small fraction of what comparable lots would normally bring in Malibu, a posh seaside community whose very name in synonymous with privilege and affluence. The lots were sold with the restrictions (whatever they were) intact.

In mid-1992, the Commission – even though no development of the lots took place and the Commission's permit and review prerogatives were not threatened – issued a temporary cease and desist order, which, after an August 12, 1992, public hearing (transcript at CT-BS 1922-72), the Commission converted (on August 20, 1992) into a permanent cease and desist order, which prohibited "the sale, conveyance in any manner of any interest" in the lots. (App. D7; 26 Cal. App. 4th at 522;[6] CT-BS 1975-76)

Forced by the Commission's *ultra vires* acts to seek judicial intervention, Petitioners responded in accordance with law. Both the controlling statutes (Public Res. Code § 30801, Code Civ. Proc. § 1094.5)[7] and the cease and desist order itself stated that the Commission's act could be challenged by a petition for a writ of mandate within 60 days of the order. Although that limitations period was shockingly short, a timely petition was filed (and in a separate action a complaint was also filed) by Petitioners. (App. D7; 26 Cal. App. 4th at 523) Petitioners sold no lots after issuance of the cease and desist order.

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[6] The Commission's statutory charter (Public Resources Code § 30000 *et seq.*) charges it with regulating development in a defined coastal zone. Who sells what to whom within that zone is none of the Commission's business; the order was thus beyond its powers.

[7] The applicable language in § 30801 is that "any aggrieved person shall have a right to judicial review of *any* decision or action of the Commission . . . " (emphasis added) *See also* Public Resources Code § 30803(a), which speaks expressly to maintaining "an action for . . . relief . . . [from] a cease and desist order."

It cannot be overemphasized that, although nominally appearing as plaintiffs, Petitioners did not take the legal initiative. The initiative was taken by the Commission when it issued the cease-and-desist order, which becomes final under California law unless challenged in a timely manner. The lawsuit instituting such a challenge is a defensive move by the party against whom the order is issued. Simply put, in functional terms, Petitioners did not sue the Commission; rather, they were sued by the Commission administratively. Recourse to the courts was the only available procedure in California by which they could test the legality of the Commission's ultimatum.

Petitioners were stopped in their tracks by an astonishing trial court ruling that their challenge to the cease and desist order was *de jure* a challenge to the underlying 1979 and 1990 permits, and thus barred by limitations and waiver. The permits were issued to neither Petitioners nor Bochner, their predecessor in title – none of whom knew of the permit-lot linkage within the 60-day period – but to Leanse and Thorne. *But Petitioners did not challenge, nor do they now challenge the permits,* nor had they any basis for such challenge. Neither did Bochner have any such basis. Nor did Leanse or Thorne. The cease and desist order, which Petitioners did challenge, was thus immunized from examination on its merits. This ruling was made in response to demurrers filed by the Commission to Petitioners pleadings. (App. D7-8; 26 Cal. App. 4th at 523) The Commission's theory was that because neither Bochner nor Petitioners acted within 60

days of issuance of the permits *to Leanse and Thorne* – even though they received no notice of the permit issuance, did not know of the permit-lot linkage, and Petitioners then owned none of property in question and had no standing or reason to challenge the permits – they are forever barred from contesting the legality of the Commission's overreaching order. Petitioners were not granted leave to amend their pleading. (*Id.*)

On appeal, the California Court of Appeal consolidated the appeals and affirmed. (App. D2; 26 Cal. App. 4th at 520) The court of appeal held that the actions became barred by limitations under Public Resources Code § 30801 – depending on the particular lot involved – on or about February 18, 1980 or on or about May 9, 1990, computing accrual from the granting of the permits to Leanse and Thorne, and holding that any underlying illegality could not be raised. (App. D11; 26 Cal. App. 4th at 525)[8] Rehearing was denied (App. B), and the California Supreme Court denied review (App. A).

Petitioners contend that the proceeding to which they were thus subjected was a plain denial of due process.

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[8] The court of appeal also expressly found that because of the TDC program, the lots "were essentially rendered valueless by the extinguishment of building rights." (App. D12; 26 Cal. App. 4th at 525 n.6)

REASONS WHY THE WRIT SHOULD ISSUE

A. Summary Of Argument

Though masquerading in the pedestrian garb of an interpretation of California law of limitations, the opinion below is revolutionary. In disregard of the Due Process Clause, it precludes landowners in that state from ever being able to defend on the merits claims of breach of covenants running with the land, even where, as here, the claimed breach is nonexistent as a matter of substantive law explicitly laid down by the state supreme court (*Morehart v. County of Santa Barbara*, 7 Cal. 4th 725 (1994)).

According to the Commission, the 60-day statute of limitations started running years earlier (on some of the lots in question 12 years earlier), before Petitioners even owned the subject land, when there was no dispute of any kind, and no one had either a cause of action, or standing to sue, or any reason to sue. Simply put, there was then no justiciable case or controversy – no lawsuit could have been brought by anyone. In fact, even on the Commission's premise, had such a lawsuit been brought then, it would have been premature as this Court made clear in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). Yet the opinion below holds that, notwithstanding, the limitations period started running then, so that Petitioners – forbidden from defending against the Commission's charges on the very impressive merits of their case – are defenseless "fair game" for any punitive "enforcement" of the invalid convenants the Commission might now choose to inflict.

Petitioners are facing the nightmare of being forbidden to engage in the activity of selling – not developing – land with whatever encumbrances and restrictions exist, on the supposed ground that this would violate the covenants. Yet, at the same time Petitioners are forbidden to show on the merits that their activities are lawful and that the covenants which purport to limit sale are unlawful – as they plainly are.[9] Beyond that, the Commission intends to impose multi-million dollar fines on Petitioners based on the supposed authority of the decision below. In a nutshell, Petitioners are being punished for doing something which (a) is clearly not illegal, and (b) whose legality *vel non* they were nonetheless forbidden to demonstrate.

Nor is this nightmare Petitioners' alone. Unless rectified by this Court the opinion below will have a devastating effect on stability of land titles. Whereas, heretofore a claim of violation of covenants had to be established on the merits by the party claiming the violation, under the decision below the acts of issuing the permits conditioned on restrictive covenants – not the

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[9] It is conceded that the mergers were not accomplished in accordance with the mandatory provisions of the state Subdivision Map Act (Gov't Code § 66451.11), which *Morehart* strictly requires. In *Morehart*, the subject property lots were within the coastal zone. 7 Cal. 4th at 763. Further, there is no evidence in the record that the TDC exaction program made any effort to conform to the controlling constitutional standards of nexus and "rough proportionality" laid down by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, ___ U.S. ___, 120 L. Ed. 2d 304, 320 (1994), or that the Commission met the burden of proof *Dolan* imposes on it.

recording of the restrictive covenants themselves, much less any asserted violation of them – is said to start the limitations period running. This raises the prospect of premature litigation disfavored by this Court; *see United States v. Dickinson*, 331 U.S. 745, 749 (1947).

The courts below held that the statute of limitations ran before either Petitioners or their predecessors in interest were aware of the nexus between the permits and the declarations of restriction. Thus, there is presented for review here a rule that by the time some act is done which triggers for the first time the charge that a violation has occurred, inquiry into the merits is said to be too late. Thus, covenants running with the land – the heretofore innocuous and constructive tool of private land-use control widely and efficiently used – have been hijacked by the government as a "regulatory" device whose impact on citizens is incapable of examination on the merits in a court of law, even where, as here, the state's highest court has held that the government's position is illegal on its face.

The implications are sweeping and horrendous. Under the rule promulgated by the court below, this Court could never have decided the landmark case of *Shelley v. Kraemer*, 334 U.S. 1 (1948), because by the time the plaintiff sued claiming that the racially exclusive 34-year old covenants denied equal protection, the limitations period in which to do so, would – under the reasoning of the court below – have long since run, barring the constitutional challenge. That is precisely what happened here. Petitioners' constitutional due process rights have been snuffed out by just such an intellectual shell game.

B. Petitioners Have Been Denied Due Process Of Law: They Were Deprived Of Their Right To A Meaningful (Or Any) Hearing On The Merits Of The Commission's Charge, On The Supposed Grounds That The Statute Of Limitations Ran Against Them When They Did Not Own The Subject Lots, And No One Had Standing Or Cause To Sue And There Could Be No Case Or Controversy To Be Litigated

The fundamental procedural due process guarantees of notice and an opportunity for a hearing (*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)) apply whenever a state seeks (as California does here through the Commission) to impair rights in property. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). The right to a hearing must be more than *pro forma*; it must be a meaningful opportunity to address the merits of the controversy.

The due process clause severely curtails the procedures a local government may employ to penalize those accused of illegal conduct; the right to present a defense in the face of such accusations is fundamental. "The hearing required by due process must have to [sic] include not merely the ability to respond to the merits of the charges against one, but also to the propriety of the sanction imposed." *Gour v. Morse*, 652 F. Supp. 1166, 1171 (D. Vt. 1987). This entails "a fair opportunity to defend against the state's accusations" (*Chambers v. State of Mississippi*, 410 U.S. 284, 294 (1973)), and for a citizen "to tell his side of the story to an impartial tribunal." *Winders v. Miller*, 446 F.2d 65, 71 (1st Cir.), *cert. denied*, 404 U.S. 985 (1971). Protection of these rights is particularly compelling where, as here, the official action purports to enforce

regulations with punitive attributes and is thus quasi-penal. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963). *See also Washington v. State of Texas*, 388 U.S. 14 (1967); *Holt v. State of Virginia*, 381 U.S. 131, 136-37 (1965).

In this case, Petitioners' actions have been purely defensive. The Commission took the litigational-administrative offensive by filing the cease and desist order. But in so doing, the Commission overreached its powers.[10] A cease and desist order proscribes certain conduct under penalty of punishment; this punishment may be very severe, as here, where the Commission has indicated its intention to use its cease and desist order and the court decision sustaining that order as vehicles for massive fines. If due process means anything, it means that the party against whom such an order issues must have *some* opportunity to contest the charges on the merits before an impartial tribunal.

This is thus exactly the kind of situation to which this Court has repeatedly spoken. By holding that Petitioners have no right to interpose a meaningful or *any* defense on the merits – under the rubric of limitations bar and

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[10] The limited scope of the Commission's power is thus described in a recent decision:

> [T]he Commission's powers and duties are only those vested in it by the Coastal Act . . . In short, the Commission is authorized to make and enforce rules and decide whether to grant permits. *It is not an adjudicatory body authorized to decide issues of constitutional magnitude.*

Healing v. California Coastal Comm'n, 22 Cal. App. 4th 1158, 1178 (1994) (emphasis added). But that is just what the Commission did here.

waiver[11] – because of purported acts or omissions of third parties years earlier that took place without Petitioners' knowledge when no case or controversy existed, the California courts – deferring to the Commission at every step – denied Petitioners a meaningful opportunity to be heard. The Commission thus succeeded in transmogrifying limitations law into a sword, not a shield.[12]

The ruling below was contrary to the teachings of this Court. If it were reconcilable with the Due Process Clause, this Court could never have decided *Shelley v. Kraemer*, challenging land use regulations and restrictions "as applied."[13] The fact that the restrictions in *Shelley*

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[11] "Waiver" is not used in the Court of Appeal opinion in the traditional sense of the intentional relinquishment of a known right. At the time of the supposed "waiver," neither Petitioners nor their predecessor in interest had such a right or knew of the permit issuance to Leanse and Thorne, and thus could not knowingly waive anything.

[12] The Commission was chastised in a prior case for gamesmanship with this very 60-day limitations period. In *Liberty v. California Coastal Comm'n*, 113 Cal. App. 3d 491 (1980), the Commission attempted to interpose the 60-day bar, even though the delay was occasioned by the Commission's own failure to timely prepare the administrative record necessary to such appeal. Both the trial court and the court of appeal appropriately rejected this argument, finding the appeal timely. The court of appeal noted that any other ruling would enable the Commission to "effectively block any appeal by simply holding up preparation of the record and thus facilitate the perpetration of an injustice by thwarting a judicial review." *Id.* at 498.

[13] Indeed, this Court has been strict in its insistence that, to the greatest extent possible, challenges to the constitutionality of land-use regulations be presented in an "as applied" posture. *See, e.g., Pennell v. City of San Jose*, 485 U.S. at 11, holding – in spite of a forceful dissent noting the *facially* unconstitutional

were 34 years old, well beyond any conceivably applicable limitations period, posed no barrier to this Court's addressing their constitutional merits and overturning them; nor did the fact that the stricken covenants in *Shelley* were covenants running with the land which ostensibly bound successors in interest. In short, *Shelley* teaches that there is no such thing as a "right" to violate the constitution *as applied* in a present controversy, on a theory that a *facial* challenge might have been made earlier but was not.[14] Particularly is this true where, as here, there was no case or controversy nor any opportunity for either Petitioners or their predecessors in interest to mount such a challenge.

What the California courts did here stands in stark contrast to the disposition of a similar case by the New York Court of Appeals. Striking down a 58-year old covenant running with the land – and specifically rejecting the same limitations defense raised here, which had been accepted by the trial court – the court held that a restrictive covenant is "no different" than a cloud on a title, and

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language in the challenged ordinance (485 U.S. at 15-18) – that the preferred mode of constitutional challenge was "as applied."

[14] To illustrate, suppose that an individual constructs and operates a movie theatre in a town that insists that only pictures suitable for the entire family be shown, and that this commitment be expressed by the theatre owner through a recorded covenant, and the owner complies. On these facts, is it conceivable that a successor owner would be deemed to have forfeited his First Amendment right to screen, for example, *Carnal Knowledge* (*see Jenkins v. Georgia*, 418 U.S. 153 (1974)), on the ground that a limitations bar now protects the town's blatantly unconstitutional policy embodied in the covenants?

the right to challenge such a covenant "is never barred by the Statute of Limitations." *Orange & Rockland Utilities, Inc. v. Philwold Estates, Inc.*, 52 N.Y.2d 253, 259, 261 (1981). The Court offered this rationale:

> The purpose of a Statute of Limitations is to put an end to stale claims, not to compel resort to the courts to vindicate rights which have not been and might never be called into question. *Id.* at 261.

Are a New Yorker's rights under the Due Process Clause superior to those of a Californian? *A fortiori* as here, where a Californian seeks to vindicate his or her constitutionally protected rights in property against a local governmental entity.

Petitioners were not only denied the review of Commission action promised them by California law, which speaks specifically to cease and desist orders (Public Resources Code §§ 30801 and 30803). They were denied their right to due process of law secured by the United States Constitution.

C. Petitioners Have Meritorious Substantive Defenses Against The Commission's Charges, But Were Not Allowed To Present Them

Petitioners' effort to seek review of the Commission's extralegal order was not frivolous. The only basis under which the lot sales could have conceivably created any irregularity would have been on the authority of the purported lot mergers. But it is now clear that they were

invalid *ab initio*. Among Petitioners' solid arguments on this point are the following:[15]

First, the lot "mergers" were not accomplished by the exclusive procedure California law demands: adherence to the requirements of the Subdivision Map Act. Interpreting Government Code §§ 66451.10(b), 66451.11, and 66451.19(d), *Morehart* held that the Act preempts ordinances of local entities – even when they are within the coastal zone – and any attempts to sidestep the Act are void and ineffective. *Morehart*, 7 Cal. 4th at 731.[16] But the court of appeal expressly declined to decide this issue, which should have been dispositive, on the ground of limitations and waiver bar. (App. D-16; 26 Cal. App. 4th at 528)

Second, to the degree that the restrictions are urged to be covenants running with the land, they are again in

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[15] Petitioners emphasize that they are *not* presenting issues of state law to this Court, but rather demonstrating here that the denial of any opportunity to present their substantive case was particularly egregious because it was manifestly meritorious. Had they been allowed to present this case, they would likely have prevailed.

[16] This is virtually conceded on the record. Bochner's statement in the declarations of restriction that he "intends" that the declarations "recombine and unify the Subject Lands in lieu of a more costly and lengthy map procedure . . . which would be undertaken but for costs and time delays" involved in complying with the Act confesses the illegality of the declarations, and is of no legal effect. It is the functional equivalent of a declaration from a young man to his fiancée that it is his intent that his declaration act as a marriage license and ceremony because he wishes to avoid blood tests, license fees and other costs associated with contracting a lawful marriage.

utter noncompliance with explicit California law because the land to be benefited and the land to be burdened are not described with particularity in the restrictions, and they are thus unenforceable beyond the parties to the declarations of restriction. Civil Code § 1468; *McCaffrey v. Preston*, 154 Cal. App. 3d 422, 436 (1984); *Harrison v. Domergue*, 274 Cal. App. 2d 19, 23 (1969) (doubts to resolved in favor of non-encumbrance).

Third, the declarations of restriction contain demonstrably false recitals. They speak, in the past tense, of findings purportedly made well after the declarations were executed. *See, e.g.*, the recital in an April 3, 1990 declaration that the Commission "decided on May 10, 1990" that certain consequences would result from certain acts. (CT-BC 34; the other declarations contain similar factually impossible recitals.) The fact that this illegal misdating of sworn documents is an apparent result of the logistics of the Commission's TDC program is no excuse; indeed, it is an aggravating factor.

Fourth, the lot mergers never actually happened. No one treated the lots as anything but discrete parcels. Please recall that Petitioners were prepared to prove that the County of Los Angeles had commenced to do exactly what Petitioners did, *i.e.*, sell the lots separately. Those who purchased the lots from the County were in the same position, legally and equitably, as Petitioners and their vendees – but the Commission apparently took no action against the County or its vendee(s).

Fifth, under settled California law neither the existence of the declarations of restriction, nor their content,

was judicially noticeable.[17] And yet the decision below does so, and rests largely on such content. This also implicates due process, because Petitioners were not permitted to demonstrate that the supposed "facts" on which the rulings below rest were not true, and the legal theories supporting them thus unsound.

Sixth, neither Bochner nor Petitioners received notice of the required public hearings related to the permit issuances. (Public Resources Code § 30621) Bochner, whose inaction supposedly effected the waiver and allowed the limitations statute to run, did not even know the lots had been matched to the Leanse and Thorne permits before expiration of the 60-day period. (CT-BC 8) This violated both state law and the Due Process Clause.

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[17] The courts below relied on Evid. Code § 452(c), which permits notice of "official acts" of governmental bodies. They did so on the tenuous ground that Commission behind-the-scenes input and formal approval of the declarations of restriction somehow transmogrified the *purely private* declarations into official acts – even though Bochner paid a recording fee that is assessed against private, but not governmental, recordations. The courts below also disregarded settled state law that where a document (public or private) is judicially noticed, *the content* thereof is still not noticeable. *De Cruz v. Los Angeles County*, 173 Cal. App. 3d 1131, 1134 (1985) ("It is equally true, however, that the taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom. . . . "); *Beckley v. Reclamation Board*, 205 Cal. App. 2d 734, 741 (1962).

Seventh, the Commission acquiesced in all of the above, making no effort to insure the legal accomplishment of the merger it now claims existed, thus waiving its right of selective "enforcement."[18]

Petitioners' arguments on these points were (for the most part) not rejected. They were simply ignored. By precluding forever any substantive challenge on the ground that Bochner, who had neither reason nor standing to sue, nonetheless should have filed years earlier what would have been a frivolous action, the rulings bestow eternal life on the fatally flawed mergers and restrictions.

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[18] The building restrictions, as distinguished from the supposed "merger," pose no conceivable barrier to alienability. Under no circumstances would their existence justify the Commission's heavy-handed intervention. All that happened – looking at this matter most favorably to the Commission – was the transfer of title to encumbered land from one owner to another. But there is an obvious question as to the validity of the imposition of the restrictions themselves. They are exactions (coerced "dedications") subject to the rules this Court has set forth in *Nollan* and *Dolan*. In *Nollan*, which postdates some of the declarations of restriction but predates others, this Court told the Commission that its exaction pattern was unconstitutional ("Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts"; 483 U.S. at 839). *Dolan* postdates both the 1979-80 activities and the 1990 activities. The record shows not the slightest effort by the Commission to comply with the nexus requirement of *Nollan* or the "rough proportionality" standard of *Dolan*. Thus, the rulings below deprive Petitioners of the opportunity of even pointing out that the Commission's coerced exactions were unconstitutional.

It should be stressed that if the purported mergers, or even the entire restrictions, were struck down, the Commission would have still retained its development permit power and review authority. The Commission's mission would have not been compromised. There was no threat of unauthorized development. Thus any balancing of a state interest against Petitioners' constitutional rights tilts the scale in Petitioners' favor. (Petitioners stress again that they do not seek review of state law issues; this material is noted only to show the severe prejudice suffered by them from the deprivation of due process.)

D. California's Draconian Land Use Regulation Law Needs To Be Returned To The American Mainstream By This Court

This case is by no means unique in its callous disregard of landowner rights. This is hardly the first time the Commission wildly overreached its limited jurisdiction, nor the first time that the California courts – apparently focusing on perceived laudable goals entrusted to the Commission – have been unwilling to confront the hard questions of whether the means the Commission chose in pursuit of those goals were constitutional.

As this Court knows from its own recent opinions and the steady stream of petitions it receives, California has chosen to go its own way in land use law. The just compensation clause of the United States Constitution in particular is simply not enforced in many cases. In the last quarter century or so, legal scholars of all persuasions – even those favoring strict land use controls – have looked in awe at California's "different drummer"

approach. Professor Dennis J. Coyle, in preparing his recent book, *Property Rights and the Constitution*, State University of New York Press (1993), asked eight leading scholars (identified at *id.* 277 n.23) to identify the states most and least protective of the rights of property owners. There was a divergence of response to the first inquiry, but "California was a near unanimous choice as the state least likely to protect landowner rights. California municipalities . . . are accustomed to meeting little resistance from the state courts." *Id.* at 11. In a lengthy chapter entitled "California: Where Deference Reigns Supreme," Coyle identifies the message of California courts to regulators as "Do what you want." *Id.* at 156.[19]

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[19] Professor Coyle's book is merely one of a series of books and articles making the same point. Other representative writings include Babcock and Siemon, *The Zoning Game Revisited*, Lincoln Institute of Land Policy (1985) ("[A]nyone who practices public law in California should know better than to expect the California courts to be sympathetic with procedural due process protests when they challenge governmental practices. The Fourteenth Amendment appears to be nonexistent"; *id.* at 251); Berger, *Silence at the Court: the Curious Absence of Regulatory Taking Cases From the California Supreme Court Jurisprudence*, 26 Loyola L.A. L. Rev. 1133, 1140 (1993); Callies, *The Taking Issue Revisited*, 37 Land Use Law & Zoning Digest 6 (July 1985) (see particularly pp. 6-7); Kudo, *Nukolii: Private Rights and Public Interest*, 16 The Urban Lawyer 279 (1974); Hagman, *Exactions, User Fees and Assessments: What Are the Limits?*, Zoning and Planning Handbook 45 (1983) (see particularly pp. 73-74); Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 The Urban Lawyer 724 (1981) (see particularly p. 724 n.6); and Williams, *American Planning Law* (1974) (see particularly § 6.03 pp. 115-16).

And if it is true that California municipalities find courts anxious to defer to their wishes, this is true *a fortiori* of the Coastal Commission. In a February, 1979 article in the California State Bar Journal, *You Can't Win Them All – Or Can You?*, Michael M. Berger demonstrated that seemingly immutable precedents tumbled like ten-pins as the Commission enjoyed a reversal rate of nearly 90% *as an appellant*. And very little has changed in the fifteen years since Mr. Berger wrote.[20]

The Coastal Commission's activities and success vividly testify to the point made in *The Zoning Game Revisited* at p. 253: "In California, the courts have elevated governmental arrogance to a fine art."[21]

Twice in 1987, this Court pointedly told California courts and public entities that they had fallen into error in constricting citizens' rights in property. The corrective cases are *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), which spoke to remedies ("the California courts have decided the compensation question inconsistently with the requirement of

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[20] Once in a while a sensitive and courageous court goes against the tide. The most notable example of this is *Healing v. California Coastal Comm'n*, 22 Cal. App. 4th 1158 (1994), where the court – reversing a trial court judgment – excoriated the Commission for denying an application to build a modest house for dragging the permit process out for 17 years under circumstances where compliance with Commission demands was impossible. But cases like *Healing* are very rare in California.

[21] The authors, Mr. Babcock and Mr. Siemon, are noted for their strong pro-government orientation in regulatory cases (the late Richard Babcock was the recognized dean of the nation's land use bar).

the Fifth Amendment" *id.* at 311) and *Nollan*.[22] Unfortunately, the correctives did not correct:[23] since 1987, not a single reported case in California – the nation's largest, most litigious and probably most intensively regulated state – shows a monetary award to a property owner for a regulatory taking or damaging of property. Res ipsa loquitur.

CONCLUSION

With respect, California courts and regulating entities need another reminder that the United States Constitution is indeed the "supreme law of the land" (U.S. Const., art. 6, cl. 2), the evasion of which is just as unseemly in relation to individual rights in property as other constitutional rights. As Justice Potter Stewart put it in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972):

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights . . . That

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[22] In *Dolan*, this Court referred to the Commission's conduct in *Nollan* as "simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into 'an out-and-out plan of extortion.' " 129 L. Ed. 2d at 317-18. The case at bench is cut from the same cloth.

[23] This is vividly illustrated by the fact that at the same time it issued *Dolan*, this Court issued an order for reconsideration in light of *Dolan* of another California case involving exactions (*Ehrlich v. Culver City*, 15 Cal. App. 4th 1737 (1993), *vacated*, ___ U.S. ___, 114 S. Ct. 2731 (1994)).

rights in property are basic civil rights has long been recognized.[24]

On the facts at bench, California has simply gone too far – again. To tell citizens that their valuable rights were snuffed out by limitations and "waiver" before they or their predecessor in interest either knew or could have known that there was a problem or could have sued to address the problem is the essence of a denial of due process.

Petitioners respectfully pray that certiorari be granted.

Dated: December 5, 1994

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[24] In *United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S. Ct. 492, 505 (1993), this Court reaffirmed this truth, identifying as "as essential principle" the fact that "[i]ndividual freedom finds tangible expression in property rights." And in *Dolan*, this Court offered a reminder that the just compensation clause is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment" and not a "poor relation." 129 L. Ed. 2d at 304.

APPENDIX

APPENDIX A

Second Appellate District, Division Two, No. B074494
S041316

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK
(Filed Sept. 8, 1994)

OJAVAN INVESTORS
INCORPORATED Et Al., Appellants

v.

CALIFORNIA COASTAL COMMISSION, Respondent

Appellants' petition for review DENIED.

MOSK
Acting Chief Justice

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

OJAVAN INVESTORS, INC., et al., Plaintiffs and Appellants, v. CALIFORNIA COASTAL COMMISSION, Defendant and Respondent.	B074494 (Super. Ct. No. BS020034 c/w No. BC056929) ORDER MODIFYING OPINION AND DENYING REHEARING. [NO CHANGE IN JUDGMENT] (Filed Jul. 13, 1994)

THE COURT:

It is ordered that the opinion filed herein on June 22, 1994, and ordered published on June 30, 1994, be modified in the following particular:

Page 20, lines 20-22: Delete the sentence which reads, "In contrast, appellants' predecessors in interest were granted their permits and agreed to the mergers." and substitute therefor the sentence, "In contrast, Thorne and Leanse were granted their permits and appellants' predecessors in interest agreed to the mergers."

The petition for rehearing is denied.

This modification does not effect a change in judgment.

/s/ Boren Gates Nott

APPENDIX C

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

OJAVAN INVESTORS, INC., et al., Plaintiffs and Appellants, v. CALIFORNIA COASTAL COMMISSION, Defendant and Respondent.	B074494 (Super. Ct. No. BS020034 c/w No. BC056929) ORDER (Filed Jun. 30, 1994)

THE COURT:

The opinion in the above entitled matter filed on June 22, 1994, was not certified for publication in the Official Reports.

For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

/s/ Boren Gates Nott

APPENDIX D

NOT BE BE PUBLISHED

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

OJAVAN INVESTORS, INC., et al., Plaintiffs and Appellants, v. CALIFORNIA COASTAL COMMISSION, Defendant and Respondent.	B074494 (Super. Ct. No. BS020034 c/w No. BC056929) (Filed June 22, 1994)

APPEALS from judgments of the Superior Court of Los Angeles County. Robert H. O'Brien and Jerry K. Fields, Judges. Affirmed.

McMillan & Bloch, William W. Bloch and Shelly D. McMillan for Plaintiffs and Appellants.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Jan S. Stevens, Assistant Attorney General, G. R. Overton and Daniel A. Olivas, Deputy Attorneys General, for Defendant and Respondent.

Appellants, Ojavan Investors, Inc., and several other real estate investment corporations, appeal judgments of

dismissal entered after the trial court sustained demurrers of respondent California Coastal Commission (the Commission), without leave to amend, as to appellants' petition for a writ of mandate and appellants' concurrently filed complaint for declaratory relief and damages.[1] Appellants sought to stay enforcement of the Commission's cease and desist order which directed that appellants refrain from the sale, conveyance or transfer of certain real property in the area of Malibu Canyon and comply with all terms and provisions of the Declarations of Restrictions which run with the land and were recorded against the property by the previous owners.

The trial court sustained the Commission's demurrers to the petition and to the complaint on the grounds that appellants' suits were barred by the applicable 60-day statute of limitations (Pub. Resources Code, § 30801) and the doctrine of waiver, and that the Commission's cease and desist order was a privileged publication (Civ. Code, § 47) which constituted a defense to the tort causes of action alleged.[2] We agree with the trial court's ruling and affirm.

PROCEDURAL AND FACTUAL BACKGROUND

The present case involves the restrictions on the development of residential property as a result of the Commission's transfer of development credits program

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[1] The appeals have been consolidated.

[2] The complaint for damages alleged causes of action for slander of title, cloud on title and intentional interference with prospective economic advantage.

(TDC Program). To "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources" (Pub. Resources Code, § 30001.5, subd. (a)) and thus to satisfy a primary objective of the California Coast Act of 1976 (Pub. Resources Code, §§ 30000 et seq.) (Coastal Act), the Commission established the TDC Program. Pursuant to the TDC Program, the Commission has on numerous occasions approved new subdivisions and development projects in the area of Malibu and the Santa Monica Mountains on the condition that the project proponents arrange to extinguish, either by direct purchase or through involvement in government programs, the development capacity of other lots. The TDC Program thus conditions the issuance of coastal development permits on the extinguishment of development rights as to other building sites in the coastal zone, either by offering to dedicate a scenic easement or by filing Declarations of Restrictions, thereby waiving development rights and unifying separate lots into one parcel.[3] The present case

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[3] The TDC Program has been recognized as a well-established mechanism by which the Commission, as well as other local governmental entities, attempts to balance a private property owner's ability to obtain development permits with the state's interest in protecting natural resources from unbridled development. (See *Rossco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642, 648, 650-651.) As a federal court observed in rejecting a landowner's constitutional challenge to a TDC Program in Marin County, "[A] finite amount of development is permitted in the area. The County is rightly indifferent as to who does the development. It lets the market decide the price. . . . The regulation permitting the accumulation of transfer rights is rationally related to the overall purpose of preserving agriculture in the area." (*Barancik v. County of Marin*

involves two development projects which came under the TDC Program.

On December 19, 1979, and May 10, 1990, the Commission issued coastal development permits to David Leanse (who subsequently assigned his permit to another party) and Larry Thorne for development in the Malibu area within the coastal zone. The Commission approved Leanse's application for a 14-unit condominium project and Thorne's application for an 18-lot subdivision and the construction of tract homes. The projects were not directly related to each other, but the Commission found that they both created the same detrimental risk of adverse cumulative impact on the environment of the coastal zone. To mitigate adverse environmental impacts, the Commission conditioned permit approval on the applicants' participation in the TDC Program. Accordingly, the applicants agreed that prior to the issuance of a permit, they would provide evidence to the Commission that development rights for residential use had been extinguished on a specified number of other building sites in the coastal zone.

The permit applicants fulfilled the TDC condition by purchasing the right to have other, unrelated landowners record deed restrictions on their lots. Specifically, Thorne contracted with and paid Dan Bochner, and Leanse contracted with and paid Sophisticated Investments, Inc. (Sophisticated) to file restrictions on the coastal zone property owned by Bochner and Sophisticated. One type

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(9th Cir. 1988) 872 F.2d 834, 837, cert. denied (1989) 493 U.S. 894.)

of restriction, the dedication of a scenic easement, extinguished the building rights on the affected lots and transferred such building rights to the permit applicants' property. Another type of restriction, the Declarations of Restrictions, merged the affected lots into larger parcels.

The Declarations of Restrictions on the properties owned by Bochner and Sophisticated were recorded with the Los Angeles County Recorder's Office on July 2, 1981 (Declaration of Restrictions No. 81-661205), July 23, 1984 (Declaration of Restrictions No. 84-875361) and June 7, 1990 (Declarations of Restrictions Nos. 90-1020016 and 90-1020017). As indicated by the language in the recorded Declarations of Restrictions, the conditional development permit issued by the Commission would have the effect of "recombin[ing] and unify[ing] the Subject lands into a single parcel for all purposes with respect to the lands included therein, including but not limited to sale, conveyance, development, taxation or encumbrance [so that] the proposed development is in conformity with the [Coastal] Act . . . . " The Declarations of Restrictions also acknowledged that the landowners had agreed to recombine the subject lots in exchange for "valuable consideration" paid by the permit holders, that each restriction "shall constitute a covenant running with the land . . . [and] shall bind the [landowners] and their successors, heirs, and assigns in perpetuity and shall benefit the People of the State of California," and that any breach of the Declarations of Restrictions shall render the landowners "or their successors liable pursuant to the provisions of [the Coastal Act]."

As a result of the Declarations of Restrictions, 77 former individual lots were recombined into 2 large lots,

one owned by Bochner and the other by Sophisticated, and the former 77 lots could not be sold off individually. In December of 1983, Sophisticated sold its interest in its recombined lot to Bochner.

In February of 1991, without the knowledge or approval of the Commission, appellants purchased from Bochner 49 of the 77 deed-restricted lots. Appellants allege that prior to their purchases, they "had conducted diligent searches of the official records of the Los Angeles County Recorder and title companies, and no impediments to the purchase of the individual lots were found," although the Declarations of Restrictions had been previously filed and stamped "RECORDED IN OFFICIAL RECORDS RECORDER'S OFFICE LOS ANGELES COUNTY CALIFORNIA." Between April 2, 1991, and January 26, 1992, six of the appellants who had purchased individual deed-restricted lots sold sixteen of those lots to third parties.

After the Commission had been alerted to appellants' purchases and to their sales of the deed-restricted lots, the Commission issued a temporary cease and desist order and recorded notices of violations on the affected lots to forestall further breach of the Declarations of Restrictions. Appellants refused to admit that the lots were deemed restricted and rejected all requests to rescind the sales. In May and July of 1992, appellants advertised several of the restricted lots for public auction. Appellants apparently admitted in the auction brochure the deed-restricted nature of the lots, as indicated by the following language in the brochure: "Unbelievably cheap, due to restrictions on development. Economists tell us the

government is broke, and only development money can fill the bureaucrats' maws. They'll *have* to develop!"

Thereafter, the Commission held a duly noticed public hearing and issued a permanent cease and desist order. The order prohibited "the sale, conveyance or transfer in any manner of any interest" in the real property at issue unless there is compliance "in all respects with the terms and provisions of [the] Declarations of Restriction recorded against said properties as Instrument Numbers 81-661205, 90-1020016, and 90-1020017." The Commission's order was dated August 20, 1992.

On October 13, 1992, appellants filed a petition for writ of mandate (see Code Civ. Proc., § 1094.5) and a separate verified complaint for damages and declaratory relief against the Commission. Neither the permit holders nor the prior owners of the lots in question are parties to the petition and complaint. At the heart of both appellants' petition and complaint are attacks upon the Declarations of Restrictions on various constitutional and statutory grounds, and therefore an attack upon the permanent cease and desist order issued by the Commission to enforce the permit's conditions.

Following the Commission's successful demurrer to the petition for writ of mandate, on the ground that the petition was barred by the statute of limitations and the doctrine of waiver, appellants moved to set aside the judgment. The court ruled that appellants had failed to establish any of the asserted grounds to vacate the judgment, that the proposed amended petition for writ of mandate still would not survive a demurrer and that its

judicial notice of the Declarations of Restrictions conclusively established that the restricted coastal development permits had been issued in December of 1979 and May of 1990. The court also denied the petition as untimely and denied the motion for reconsideration of the order of dismissal as untimely.

The Commission also successfully demurred to appellants' companion complaint for damages and declaratory relief. The court ruled that appellants' only remedy was by way of a timely petition for a writ of mandate and that the tort causes of action were not only barred by the statute of limitations but also by the statutory privileged publication doctrine in Civil Code section 47.

Appellants appeal the judgment entered on January 21, 1993, dismissing the petition for writ of mandate, the related order dated March 12, 1993, denying the motion to set aside that judgment, and the judgment entered on March 26, 1993, dismissing the complaint. Pursuant to this court's order, the appeals have been consolidated.[4]

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[4] On appeal, the Commission has moved for partial dismissal of the appeal and requested imposition of sanctions based on the theory that an order denying reconsideration of the sustaining of a demurrer is a nonappealable order. An order denying a motion for reconsideration is appealable where it is based upon new grounds not entertained in conjunction with the original order or judgment. (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 477; see *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 710.) In an effort to determine whether the order denying reconsideration was truly a final determination of the rights and obligations of the parties and thus appealable, or was merely the result of a sterile

DISCUSSION

I. Appellants' Claims Are Barred by the Statute of Limitations

Appellants' petition for writ of mandate and complaint are barred by the statute of limitations in Public Resources Code section 30801, which provides as follows: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action has become final." Although appellants filed their petition and complaint within 60 days of the August 20, 1992, cease and desist order, appellants' challenges amount solely to an attempt to litigate the Commission's right to enforce permits issued on December 19, 1979, and May 10, 1990. Appellants were not parties to the original permits, they purchased the lots in question eight months after the last of the four Declarations of Restrictions were recorded, and they filed suit to challenge the permits between two and twelve years after the Thorne and Leanse permits were issued. It is well settled that a landowner who claims that a permit condition imposed by the Commission constitutes a taking must first establish the invalidity of the

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attempt to have a previous appealable judgment set aside, we need not assess whether the motion for reconsideration contained any significant new evidence or legal principles. (See *Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1075-1076.) Under any view of the trial court's order denying reconsideration, appellants' claims are barred, as discussed hereinafter. The Commission's request for the imposition of sanctions is denied.

condition by way of a timely petition for a writ of administrative mandamus. Failure to file such a timely petition results in waiver of any inverse condemnation and related claims. (*California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1496.)

The present case is somewhat similar to the situation in *Rossco Holdings, Inc. v. State of California, supra,* 212 Cal.App.3d 642. In *Rossco Holdings,* the plaintiff-landowners, in exchange for development permits, agreed to participate in the Commission's TDC Program. Although the landowners complied with the conditions of the development permits, including the TDC condition, the landowners thereafter filed a complaint against the Commission alleging inverse condemnation, denial of due process and civil rights violations. The Commission demurred and alleged, among other grounds, that the claims were barred by the 60-day statute of limitations. (*Id.* at pp. 648-649.) The trial court sustained the demurrer without leave to amend but only as to some claims, and both parties appealed. (*Id.* at p. 650.) The Court of Appeal held that all the landowners should have been dismissed with prejudice (*id.* at p. 662) and reasoned as follows: "Regardless of whether [a landowner] pleads its cause of action as one for inverse condemnation or as a denial of due process, the essential underpinning of its recovery is the invalidity of the administrative action. That action must be reviewed by [a timely] petition for writ of administrative mandate. Failure to do so renders the administrative action immune from collateral attack." (*Id.* at p. 660.)

The only salient distinction between the facts in *Rossco Holdings* and the situation here is that the landowners in *Rossco Holdings* were the parties granted the permits, and appellants here are third parties who are bound by permits issued to others. Contrary to appellants' assertion, there is nothing fundamentally unfair or "Kafkaesque" about their inability because of a lack of standing to have challenged coastal development permits issued years ago to other parties and their present inability to challenge, because of the statute of limitations, the same permits which now affect them. To the contrary, it would be illogical and unfair to grant third parties, such as appellants, the right to challenge permits when such a challenge would be time barred if brought by the party who was initially granted the permit. A permit holder also must have legal confidence after a definite point in time in investing financial resources to implement an approved development. Once the 60-day statute of limitations has run, the permit issued must be deemed good as against the world.

We therefore hold that the time to challenge coastal development permits issued pursuant to the TDC Program is within the statutory 60-day period after issuance of the permits (Pub. Resources Code, § 30801), not when a party or a successor in interest elects to violate Declarations of Restrictions imposed pursuant to the permits, and a cease and desist order ensues. There is no legal impropriety or fundamental unfairness regarding the limited legal challenges available to a successor in interest to pursue a matter which prior to the parties' interest was

time barred.[5] Indeed, concluding that appellants must be bound by what their grantee had to convey, i.e., property limited by permits and Declarations of Restrictions which had not previously been challenged, is particularly appropriate here. Appellants were apparently aware of the deed-restricted nature of the property they bought for speculative investment, as indicated by the advertising language in the auction brochure, which revealed knowledge of the limited and restricted nature of the lots.[6]

Appellants also assert that their claims are not time barred because no permits were actually issued to the original parties (Leanse and Thorne). According to appellants, permits were not issued because the documents purporting to be permits contained language indicating that such documents are merely conditional permits, with the actual permits to be issued later after numerous conditions have been satisfied. However, whether the permits in question were conditional or unconditional, they still existed and were permits.

Equally unavailing is appellants' assertion that there was no prior statutory notice given to them or to their

---

[5] We note that appellants would have been entitled to but did not challenge any flaws as to the cease and desist hearing itself and any failure to follow requisite statutory guidelines regarding the hearing.

[6] Appellants do not challenge the restrictions which dedicated scenic easements and thus extinguished building rights on the lots. Appellants challenge only the Declarations of Restrictions which merged the lots into two parcels and thus effectively thwarted their efforts to auction lawfully the numerous smaller parcels which were essentially rendered valueless by the extinguishment of building rights.

predecessors in interest prior to any public hearings concerning the permits affecting appellants' lots, and that there were no permits which affected appellants' lots because the lots were not mentioned in the permits. The failure to have given appellants statutory notice of the permit hearings is understandable since they did not own the property in question in 1979 and 1990, the years the permits were issued. To the extent that any predecessor in interest lacked notice, appellants have no standing to raise such a complaint. As to the failure of the Leanse and Thorne permits to refer to the lots subsequently purchased by appellants or to mention any restrictions on the lots, such failure is of no consequence in view of the Declarations of Restrictions which were duly filed in the county recorder's office. It is well settled that the burdens of permits run with the land once the benefits have been accepted. (See *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511; *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78.) Accordingly, the Declarations of Restrictions run with the land and bind appellants even though they were not parties to the deed restrictions.

Moreover, and also contrary to appellants' assertion, the provisions in Civil Code sections 1457 et seq. regarding the transfer of obligations do not constrain the ability of a Declaration of Restrictions to run with the land. Civil Code section 1460, by its terms, applies only to "covenants" which are "contained in grants of estates in real property." The only "covenants which run with the land" are those described in that statutory scheme. (Civ. Code, § 1461.) However, the burdens of permits reflected in Declarations of Restrictions run with the land and are not within the ambit of the provisions of Civil Code section

1457 et seq., which define only the parameters of covenants contained in grants, and not conditions contained in coastal development permits.

Finally, appellants assert that the statue of limitations bar, as well as the related defense of waiver discussed hereinafter, is premised on the trial court's improper judicial notice of the Declarations of Restrictions. In support of the demurrer to the petition for writ of mandate, the Commission requested that the trial court take judicial notice pursuant to Evidence Code section 452, subdivision (c) of the four Declarations of Restrictions. In support of the demurrer to the complaint for damages, the Commission requested that the trial court take judicial notice of only one of the Declarations of Restrictions, since appellants had attached the other three to their verified complaint. The trial court thereafter dismissed both suits based upon the Declarations of Restrictions.

The Commission explicitly crafted the Declarations of Restrictions and required their recordation pursuant to the Thorne and Leanse permits. The documents thus were not prepared by a private party and merely on file with a state agency (cf. *People v. Thacker* (1985) 175 Cal.App.3d 594, 598 (articles of incorporation and other documents prepared by a private party and filed with the Secretary of State may not be judicially noticed)), and the trial court properly took judicial notice of the official acts of a government department (Evid. Code, § 452, subd. (c)) in ruling on the demurrer. (Code Civ. Proc., § 430.70.) Accordingly, the trial court properly granted the demurrer based upon its analysis of the permits, Declarations of Restrictions and the applicable statute of limitations.

II. The Doctrine of Waiver

As previously noted, appellants' predecessors in interest who owned the lots in question recorded the Declarations of Restrictions in exchange for "valuable consideration" and signed restrictions an intent to recombine and unify the lots in question, with any breach in the Declarations of Restrictions rendering the landowners or their successors in interest liable pursuant to the provisions of the Coastal Act. "A landowner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity, and accepting the benefits afforded by the permit." (*Rossco Holdings Inc. v. State of California, supra,* 212 Cal.App.3d at p. 654.)

Since appellants' predecessors in interest waived their right to challenge the permit's TDC condition because they specifically agreed to and complied with the condition and accepted the benefits afforded by the permits and such predecessors in interest could not transfer or assign to appellants any legal rights greater than they themselves possessed (see 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 948, p. 844; Code Civ. Proc., § 368), appellants obtained the property in question with the same limitations and restrictions which bound their predecessors in interest. Although there must be a knowing, voluntary and intelligent waiver of a constitutional right, such as the Fifth Amendment right to be free from a taking of property without just compensation, it is not the Fifth Amendment right which appellants have waived. Rather, appellants have waived, by their purchase of deed-restricted lots, any right to a property

interest greater than that conveyed by their predecessors in interest. As with the analogous situation of covenants which run with the land (Civ. Code, § 1457 et seq.), appellants can take "only the title [the prior owner] had and subject to prior recorded instruments." (*Oceanside Community Assn. v. Oceanside Land Co.* (1983) 147 Cal.App.3d 166, 176, fn. 7.) The trial court therefore properly sustained the demurrer on the additional ground of the doctrine of waiver.

At oral argument, in support of their contention that the TDC program runs afoul of the California Subdivision Map Act relating to merger (Gov. Code, § 66410 et seq.), appellants relied on the recent California Supreme Court decision in *Morehart v. County of Santa Barbara* (May 12, 1994, S030829) ___ Cal.4th ___ [94 S.O.S. 3404].) The opinion in that case concludes that the Map Act impliedly prempts [sic] "any local zoning ordinance provision that purports to require, as a condition to issuance of a development permit, merger of parcels that the county could not compel under [Government Code] section 66451.11." (*Id.* at p. ___ [94 S.O.S. at p. 3405].) We need not decide if the TDC Program's lot unification procedures are also prempted by the Map Act, since we have concluded that the trial court properly sustained the Commission's demurrer on the basis of the statute of limitations and the doctrine of waiver. The petitioners in *Morehart* who applied for a coastal development permit did not obtain one because they did not agree to any merger of their parcels; instead they petitioned for a writ of mandate. In contrast, appellants' predecessors in interest were granted their permits and agreed to the mergers. Appellants' purchased the unified parcels with notice of the

recorded declarations of restrictions and cannot at this late date assert claims their predecessors could have presented but did not.

III. The Cease-and-desist Order Is a Privileged Communication

In sustaining the demurrer to the complaint for damages, the trial court deemed the causes of action for slander of title, cloud on title and intentional interference with prospective economic advantage as barred pursuant to the privileged publication doctrine in Civil Code section 47. Civil Code section 47, subdivision (b) provides that a "privileged publication or broadcast is one made . . . [i]n any . . . judicial proceeding, or . . . in any other official proceeding authorized by law." This privilege "extends to quasi-judicial as well as judicial proceedings." (*Lebbos v. State Bar* (1985) 165 Cal.App.3d 656, 667), and the Commission's hearings are quasi-judicial. (*Rossco Holdings Inc. v. State of California, supra,* 212 Cal.App.3d at p. 658.) The immunity from liability afforded by a privileged communication applies to actions for defamation as well as to bar other tort actions based on publications in protected proceedings, including a cause of action for interference with prospective economic advantage. (*Lebbos v. State Bar, supra,* 165 Cal.App.3d at p. 667.) Such immunity is properly raised by demurrer. (*Wilton v. Mountain Wood Homeowners Assn.* (1993) 18 Cal.App.4th 565, 569.) Therefore, the trial court correctly deemed the relevant causes of action barred by Civil Code section 47.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED.

/s/ Boren
BOREN, P.J.

We concur:

/s/ Gates
GATES, J.

/s/ Nott
NOTT J.

APPENDIX E

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OJAVAN INVESTORS, INC., et al.,	No. BC056929
	ASSIGNED TO JUDGE JERRY K. FIELDS
Plaintiffs,	JUDGMENT
v.	(Filed March 26, 1993)
CALIFORNIA COASTAL COMMISSION, et al.,	Date: March 15, 1993
	Time: 8:30 a.m.
	Place: Dept. 21
Defendants.	Trial Date: None
	Motion Cut-Off: N/A
	Discovery Cut-Off: N/A

The general demurrer of Defendants came on regularly on March 15, 1993, in Department 21 of the above-captioned Court located at 111 North Hill Street, Los Angeles, California, the Honorable Jerry K. Fields presiding. California Deputy Attorney General Daniel A. Olivas appeared on behalf of Defendants. Shelly McMillan, Esq. and Matthew Pero, Esq. appeared on behalf of Plaintiffs.

The Court considered the oral and written arguments in support of and in opposition to the general demurrer. The Court also took judicial notice of Judge Robert O'Brien's dismissal with prejudice of related petition for writ of mandate number BS020034. Upon due consideration of the above as well as the complaint itself, and having ordered dismissal with prejudice of the entire complaint,

IT IS ORDERED, ADJUDGED AND DECREED THAT

1. Plaintiffs shall take nothing by way of their complaint because the only remedy available to Plaintiffs to challenge an adverse administrative action of the California Coastal Commission is a timely petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5;

2. Further, the Court finds that Defendants' issuance of the Cease and Desist Order is a privileged publication under Civil Code section 47 because it was made in a quasi-judicial proceeding authorized by law. Therefore, Plaintiffs' fourth, fifth, and sixth causes of action (i.e., slander of title, cloud on title, and intentional interference with prospective economic advantage, respectively) cannot withstand demurrer; and

3. Defendants shall not recover their costs of suit because they do not seek such costs.

DATE: 3/26/93

/s/ Jerry K. Fields
HON. JERRY K. FIELDS
JUDGE OF THE SUPERIOR COURT

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OJAVAN INVESTORS, INC., et al., Petitioners, vs. CALIFORNIA COASTAL COMMISSION, Respondent.	CASE NO. BS 020 034 (Filed March 12, 1993)

1. Motion to Set Aside Judgment:

The petition was filed October 13, 1992. Petitioner also filed a "Notice of [attached] Lodging of Transcript . . . " on October 13, 1992 and properly scheduled hearing in Department 86 for November 12, 1992.[1] On November 2, 1992, petitioner filed a notice of related cases and on December 28, 1992, Department 1 of the Court ordered three cases related, including this one, and assigned the cases to Department 69, Judge Rappe, pursuant to the Los Angeles Superior Court Rule 1303.6. In the meantime, respondent filed a demurrer to the petition, which was scheduled for Department 86 but heard

[1] Under the Court's rules, manuals and published policies Departments 85 and 86 in the Central District handle all petitions for writs of mandate filed in the Central District. Cases with the last two digits of the case number ending odd are assigned to Department 85 and if ending even are assigned to Department 86. (*See*, Los Angeles Superior Court Rules 302, Section 13; Paragraph 259 of Law & Discovery Manual).

in Department 85, because Judge O'Neil of Department 86 was absent on December 30, 1992. On that date, the Court sustained the demurrer without leave to amend and served the minute order reflecting the ruling. On January 21, 1993 the Court signed the judgment.

The Court rules on Evidence Objections by Respondent (ref. "Respondents Objections . . . " filed February 26, 1993) as follows:

Sustain: I, II (¶¶ 1, 2, 6, 7);

Overrule: II (¶¶ 3, 4, 5).

The motion is denied. Petitioner has failed to establish any of the asserted grounds. (*See,* Notice of Motion, ¶¶ 1) through 6), pp. 2-3). Moreover, upon comparing the "(Proposed) Amended Verified Petition for Writ of Mandate" (Ex. B to McMillen Declaration filed January 14, 1993) with the filed petition the Court notes that the objections raised by the demurrer are still well-founded. The Court took judicial notice of the exhibits attached to the demurrer and those exhibits *conclusively* establish that restricted coastal development permits were issued between December 19, 1979 and May 10, 1990. The within petition is simply, and unequivocally, untimely as ruled by the Court on December 30, 1992.

The within motion is based on Code of Civil Procedure section 473; that is, the judgment was "taken against . . . [petitioner] through . . . mistake, inadvertence, surprise, or excusable neglect." At best, petitioner expresses surprise at the judgment having been executed and entered while its motion for reconsideration was before the Court. There is nothing unusual about that

process. (*See, e.g.*, C.C.P. § 581(f)(1); *Berri v. Sup.Ct.*, 43 Cal.2d 856; *Souse v. Capital Co.*, 220 Cal.App.2d 744, 755; *Calif. Amonia Co. v. Macco Corp.*, 270 Cal.App.2d 429, 433; *Sadler v. Turner*, 186 Cal.App.3d 245, 230; *Wilburn v. Oakland Hosp.*, 213 Cal.App.3d 1107, 1111).

2. Motion for Reconsideration:

The Court's ruling was issued and served by mail on December 30, 1992. Code of Civil Procedure section 1008 allows a motion for reconsideration to be made "within ten days after service . . . of written notice of entry of the order . . . " Petitioner's motion was filed January 19, 1993, twenty days after the Court's ruling and service thereof. Code of Civil Procedure section 1013 is not applicable, because the ten-day period in Code of Civil Procedure section 1008 does not manifest "any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of the document served by mail . . . " The motion for reconsideration is not timely and is denied.

In ruling on both of these motions the Court does not rely on respondent's argument that the motion should have been initially made before the judge who signed the judgment and sustained the demurrers. As it turns out, that is what is happening and the issue is moot.

DATED: March 12 , 1993

/s/ Robert H. O'Brien
Robert H. O'Brien
Judge of the
Superior Court

APPENDIX G

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OJAVAN INVESTORS, INC., et al., Petitioners, v. CALIFORNIA COASTAL COMMISSION, Respondent.	No. BC020034 ~~[PROPOSED]~~ JUDGMENT (Filed Jan. 1, 1993) Date: Dec. 30, 1992 Time: 8:30 a.m. Place: Dept. 85 Trial Date: None Motion Cut-Off: N/A Discovery Cut-Off: N/A

The general demurrer of Respondent California Coastal Commission came on regularly on December 30, 1992, in Department 85 of the above-captioned Court located at 111 North Hill Street, Los Angeles, California, the Honorable Robert H. O'Brien presiding. California Deputy Attorneys General G. R. Overton and Daniel A.

Olivas appeared on behalf of Respondent. William Bloch, Esq. appeared on behalf of Petitioners.

The Court considered the oral and written arguments in support of and in opposition to the general demurrer. The Court also took judicial notice of the Declarations of Restrictions which were attached to the demurring papers as Exhibits 1 through 4. Upon due consideration of the above as well as the petition itself, and having ordered dismissal with prejudice of the petition,

IT IS ORDERED, ADJUDGED AND DECREED THAT

1. Petitioners shall take nothing by way of their petition because it is barred by the doctrine of waiver and by the statute of limitations in the California Coastal Act of 1976, Public Resources Code Section 30801; and

2. Respondent shall not recover its costs of suit because is does not seek such costs.

DATE: 1-21-93

ROBERT H. O'BRIEN
HON. ROBERT H. O'BRIEN
JUDGE OF THE SUPERIOR COURT

Supreme Court, U.S.
FILED
DEC 29 1994
OFFICE OF THE CLERK

No. 94-1013

In The

Supreme Court of the United States

October Term, 1994

OJAVAN INVESTORS, INC., et al.,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the state court decision is supported by the adequate and independent state ground that Petitioners' lawsuits are barred by the Coastal Act's 60-day statute of limitations because Petitioners filed suit between 2 and 12 years after the Coastal Commission issued the coastal development permits.

2. Whether the state court decision is supported by the adequate and independent state ground that Petitioners' lawsuits are barred by the state common law doctrine of waiver because Petitioners' predecessors-in-interest voluntarily acceded to the coastal development permits in exchange for valuable consideration.

3. Whether the state court decision is supported by the adequate and independent state ground that Petitioners' lawsuits are barred by the state statutory law of assignment because Petitioners cannot assert a right to a property interest greater than that conveyed by their predecessors-in-interest.

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No. 94-1013

In The

Supreme Court of the United States

October Term, 1994

OJAVAN INVESTORS, INC., et al.,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

Respondents California Coastal Commission, et al.,[1] respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the California Court of Appeal. Citations herein will be to the

[1] Besides suing the Coastal Commission in a mandate action, Petitioners also sued separately for damages the following individual Commissioners, in-house counsel, and enforcement staff: Thomas W. Gwyn, Lily Cervantes, Gary Giacomini, Madelyn Glickfeld, David Malcolm, Linda Moulton-Patterson, Bonnie Neely, Dorill Wright, Peter Douglas, Ralph Faust, John Bowers, Nancy Cave, Diana Doo, William Rick, and Jane Yokoyama. Respondents shall be referred to collectively as "Coastal Commission."

opinion as it is reprinted at Appendix D to Petition for Writ of Certiorari ("Pet.").

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. section 1257(a). Jurisdiction, however, is lacking because the state court judgment is supported by adequate and independent state law grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Public Resources Code section 30801 is pertinent to this case. (Appendix A hereto.) California Code of Civil Procedure section 368 is also pertinent to this case. (Appendix B hereto.) Petitioners assert, and the Coastal Commission disagrees, that the Fifth and Fourteenth Amendments to the United States Constitution are pertinent to this case.

REASONS FOR DENYING THE WRIT

The writ should be denied because the state court decision is supported by adequate and independent state law grounds as embodied in the Coastal Act's statute of limitations, the common law doctrine of waiver, and state statutory law of assignment.

Petitioners' position, if adopted, would undermine the finality of all coastal development permit decisions

and thereby cloud the legal status of all completed developments in the coastal zone. In rejecting Petitioners' theory, and in recognizing the economic havoc such a position would cause, the state court capsulized the public policy behind timely challenges to coastal development permits: "A permit holder . . . must have legal confidence after a definite point in time in investing financial resources to implement an approved development. Once the 60-day statute of limitations has run, the permit issued must be deemed good as against the world." (*Ojavan Investors, Inc. v. California Coastal Comm'n* ("*Ojavan Investors*"), at 11.)

Furthermore, Petitioners do not and cannot cite a case where deed restrictions on development such as those utilized by the Coastal Commission in this case have been struck down as unconstitutional. This is because the courts have either rejected, as without merit, constitutional challenges to such restrictions or have held that all constitutional challenges are barred once the limitations period has run and/or the permit applicant accepts the terms of the permit thereby waiving any potential challenge.

The petition for writ of certiorari, therefore, should be denied because the state court decision is supported by adequate and independent state law grounds.

STATEMENT OF THE CASE

A. The Facts of the Case

On December 19, 1979, and May 10, 1990, the Coastal Commission issued coastal development permits to David Leanse and Larry Thorne, respectively, for development in the Malibu area within the coastal zone. (*Ojavan Investors, supra,* at 4.) Messrs. Leanse and Thorne are not and have never been parties to this litigation. (*Id.,* at 7.) The Coastal Commission approved Leanse's application for a 14-unit condominium project and Thorne's application for an 18-lot subdivision and the construction of tract homes. (*Id.,* at 4.) These two projects were not directly related to each other but the Coastal Commission found that both of them created the same risk of adverse cumulative impacts on coastal resources. (*Ibid.*) To mitigate such adverse impacts, the Coastal Commission conditioned permit approval on the applicants' participation in the Coastal Commission's Transfer of Development Credits Program ("TDC Program"). (*Ibid.*) Accordingly, the applicants agreed that prior to the issuance of their respective permits, they would provide evidence to the Coastal Commission that development rights for residential use had been extinguished on a specified number of building sites in the coastal zone. (*Ibid.*)

The permit applicants fulfilled the TDC condition by purchasing, in the private market place, the right to have other, unrelated landowners record documents restricting development on their lots. (*Ojavan Investors, supra,* at 4.) One restriction, known as an Offer To Dedicate a Scenic Easement ("OTD"), extinguished the building rights on the subject lots by transferring such rights to the permit

applicants' own properties. (*Id.*, at 4-5) The OTD is not challenged by Petitioners. (*Id.*, at 12 n. 6.) The other restriction was embodied in four Declarations of Restrictions which "recombine[d] and unif[ied] the Subject lands into a single parcel for all purposes . . . including but not limited to sale, conveyance, development, taxation or encumbrance [so that] the proposed development is in conformity with the [Coastal] Act. . . . " (*Id.*, at 5.) The Declarations of Restrictions also provide that "[a]ny breach . . . shall . . . render the [landowners] or their successors liable pursuant to the [Coastal Act]." (*Ibid.*) Further, each restriction "shall constitute a covenant running with the land . . . [and] shall bind the [landowners] and their successors, heirs, and assigns in perpetuity and shall benefit the People of the State of California." (*Ibid.*) The Declarations of Restrictions state that the private landowners agree to recombine the subject lots in exchange for "valuable consideration" paid by the private permit applicants. (*Ibid.*)

Pursuant to their respective agreements with the permit applicants, Petitioners' predecessors-in-interest recorded the Declarations of Restrictions on their lots on July 2, 1981, July 23, 1984, and June 7, 1990. (*Ojavan Investors, supra*, at 5.) The result was that the 77 former individual lots were recombined into 2 larger lots. (*Ibid.*) Thus, either of the 2 newly-recombined lots could be sold, but the former 77 lots could *not* be sold-off individually. (*Id.*, at 6.)

In February 1991, without the knowledge or approval of the Coastal Commission, Petitioners purchased a total of 49 of the 77 deed restricted lots. (*Ojavan Investors, supra*, at 6.) Between April 2, 1991, and January 26, 1992,

six of the Petitioners sold a total of 16 deed restricted lots to third parties. (*Ibid.*) After being alerted to Petitioners' purchases and sales of the deed restricted lots, which by the terms of the Declarations of Restrictions constituted violations of the Coastal Act, the Coastal Commission was unsuccessful in its attempts to convince Petitioners, by discussion and negotiations, that their activities violated the Coastal Act. (*Ibid.*) Consequently, the Coastal Commission's Executive Director issued temporary cease and desist orders, as expressly authorized under the Coastal Act, to forestall a further breach of the Declarations of Restrictions. (CT-BS, at pp. 23, 24, 391, 879, 900-903.)[2]

As characterized by the state court, in May and July of 1992, Petitioners "apparently admitted" in auction brochures the "deed-restricted nature of the lots, as indicated in the following language in the brochure: 'Unbelievably cheap, due to restrictions on development. Economists tell us the government is broke, and only development money can fill the bureaucrats' maws. They'll *have* to develop!' " (*Ojavan Investors, supra*, at 6-7, emphasis original.) Aside from this vague reference to the restrictions in

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[2] On June 11, 1993, the appellate court granted the Coastal Commission's motion to consolidate Petitioners' appeals for all purposes because, as noted in the motion, Petitioners split their cause of action into two separate suits despite admitting that both arise out of the identical facts with virtual identity of parties. Two separate Clerk's Transcripts were prepared and filed at the appellate court. Accordingly, the Clerk's Transcript in Petition for Writ of Mandate, Superior Case BS020034, will be referred to as "CT-BS." The Clerk's Transcript in Complaint for Damages, Superior Case BC056929, will be referred to as "CT-BC."

the promotional language, however, Petitioners never informed the public that the sale of the formerly individual lots was a violation of the duly recorded Declarations of Restrictions executed by Petitioners' predecessors-in-interest. (*Ibid.*) Because of Petitioners' apparent intent to continue to sell the deed restricted lots in defiance of the Executive Director's temporary cease and desist orders, the Coastal Commission "held a duly noticed public hearing" to determine whether to issue a permanent cease and desist order against Petitioners, and others. (*Id.*, at 7.) The Coastal Commission's permanent cease and desist power, delineated in Public Resources Code section 30810, states in relevant part: "If the commission, after public hearing, determines that any person . . . has undertaken, or is threatening to undertake, any activity that . . . is *inconsistent with any permit previously issued by the commission,* the commission may issue an order directing that person . . . to cease and desist." (Emphasis added.) After receiving live testimony and documentation from Petitioners, the Coastal Commission voted to issue a permanent cease and desist order prohibiting Petitioners from further violating the Declarations of Restrictions. (*Ojavan Investors, supra,* at 7; CT-Pet., at p. 1919.)

B. Litigation History

On October 13, 1992, Petitioners filed a verified petition for writ of mandate and companion action for damages against the Coastal Commission, the Commissioners, in-house counsel and staff. (*Ojavan Investors, supra,* at 7; CT-BC, at pp. 1-56.) Neither the permit holders nor the prior owners of the subject lots are parties to Petitioners'

petition and complaint. (*Ojavan Investors, ibid.*) The "heart of both . . . [the] petition and complaint are attacks upon the Declarations of Restrictions on various constitutional and statutory grounds, and therefore an attack upon the permanent cease and desist order issued by the Commission to enforce the permit's conditions." (*Ibid.*) Petitioners "would have been entitled to but did not challenge any flaws as to the cease-and-desist hearing itself and any failure to follow requisite guidelines regarding the hearing." (*Id.*, at 12 n. 5.) In other words, Petitioners collaterally attacked the permits' deed restrictions, and Petitioners never alleged that the cease and desist hearing *itself* was not conducted pursuant to all applicable notice and other requirements.

The trial court dismissed Petitioners' actions and the Court of Appeal affirmed for the following reasons: (1) the suits were barred by the 60-day statute of limitations of the Public Resources Code section 30801 because the permit conditions relating to the deed restrictions were not challenged within that limitations period; (2) the suits were barred by the doctrine of waiver because Petitioners' predecessors-in-interest waived the right to challenge the Coastal Commission's determinations by voluntarily participating in the TDC Program; and (3) the suits were barred by the state law of assignment as codified in Code of Civil Procedure section 368. (*Ojavan Investors, supra*, at 9, 15, 18.) The Court of Appeal subsequently denied Petitioners' petition for rehearing. (Pet., at p. 1.) On September 8, 1994, the California Supreme Court denied Petitioners' request for review. (*Ibid.*)

ARGUMENT

I.

THE STATE COURT'S DECISION RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

This Court cannot review a state court decision supported by an adequate and independent state law ground. (*Coleman v. Thompson*, 501 U.S. 722, 729 (1991).) This rule is jurisdictional. (*Ibid.*) The instant petition suffers from this very defect. The state court applied well-established California statutory and common law in holding that Petitioners' claims were barred by the Coastal Act's statute of limitations, the state common law doctrine of waiver, and the state statutory law of assignment.[3] At the lower courts, Petitioners never raised a constitutional attack on any state statutes, court doctrines or administrative cease and desist actions. (*See* Petitioners' petition for writ of mandate and companion complaint for damages, CT-BS, at pp. 1-222; CT-BC, at pp. 1-56.) In any event, the state court properly applied limitations, waiver and assignment principles as follows.

A. The Coastal Act's Statute of Limitations

Petitioners challenge the Coastal Commission's right to enforce permits issued on December 19, 1979, and May 10, 1990. In the main, their theory is that the deed restrictions resulted from long past permit actions that were

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[3] The conclusion that the outcome of the state court's judgment is predicated on state law is underscored by Petitioners' arguments which identify seven state law issues, each of which was raised in the courts below. (Pet., at pp. 9, 19-22.)

either unconstitutional or inconsistent with later cases interpreting state statutory law. As the Court of Appeal observed, Petitioners sought now to reverse these permit actions despite the fact that Petitioners "were not parties to the original permits, they purchased the subject lots eight months after the last of the four Declarations of Restrictions [was] recorded, and they filed suit to challenge the permits between two and twelve years after the Thorne and Leanse permits were issued." (*Ojavan Investors, supra,* at 9.) Based on these facts, the state court held that Petitioners' suits are barred by the Coastal Act's statute of limitations. (*Ibid.*; Pub. Res. Code § 30801.)

Since the enactment of the Coastal Act, the courts have applied, without exception, section 30801's limitations period to any challenge of the Coastal Commission's permit decisions. (*See, e.g., Patrick Media Group, Inc. v. California Coastal Comm'n,* 9 Cal.App.4th 592, 613 (1992); *Rossco Holdings, Inc. v. State of California,* 212 Cal.App.3d 642, 660 and n. 8 (1989), *cert. denied,* 494 U.S. 1080 (1990); *California Coastal Comm'n v. Superior Court (Ham),* 210 Cal.App.3d 1488, 1498 (1989).) Such permit decisions constitute administrative *res judicata* and, therefore, are immune from collateral attack. (*Ibid.*) "[I]ndulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert." (*California Coastal Comm'n v. Superior Court (Ham), supra,* 210 Cal.App.3d at 1498.)

The state court in *Ojavan Investors* based its decision, in large part, on the similar case of *Rossco Holdings, supra.* In *Rossco Holdings,* plaintiff landowners, in exchange for

development permits, agreed to participate in the Coastal Commission's TDC Program. (212 Cal.App.3d at 648.) Despite the fact that the statute of limitations had run, and despite the fact that the landowners complied with the conditions of the development permits – including the TDC condition – the landowners filed a complaint against the Coastal Commission alleging inverse condemnation, denial of due process and civil rights violations. (*Ibid.*) On appeal, the court ruled that *all* these claims were barred by limitations and waiver principles. (*Id.*, at 662.) The landowners' petition for writ of certiorari was eventually denied (494 U.S. 1080 (1990)) thus leaving intact the following holding:

> "Regardless of whether [the landowner] pleads its cause of action as one for inverse condemnation or as a denial of due process, the essential underpinning of its recovery is the invalidity of the administrative action. That action must be reviewed by [a timely] petition for writ of administrative mandate. Failure to do so renders the administrative action immune from collateral attack." (212 Cal.App.3d at 660, citations omitted.)[4]

Consistent with *Rossco Holdings*, the state court in *Ojavan Investors* properly held that "the time to challenge coastal development permits issued pursuant to the TDC Program is within the statutory 60-day period after issuance of the permits . . . [and] not when a party or a

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[4] Petitioners' failure to even mention the *Rossco Holdings* case is odd particularly since the appellate court in *Ojavan Investors* cited, quoted and applied *Rossco Holdings* in affirming the judgments of dismissal.

successor in interest elects to violate Declarations of Restrictions imposed pursuant to the permits, and a cease and desist order ensues." (*Ojavan Investors, supra,* at 11.)

The state court's concern for a timely finality to challenges to coastal development permits follows a long line of court decisions and economic commentary in the area of land use. For example, the courts have noted that short statutes of limitations are desirable because delays in the resolution of land use disputes ultimately and adversely affect development and housing costs. (*Presenting Jamul v. Bd. of Supervisors,* 231 Cal.App.3d 665, 672 (1991).) Similarly, in *R. R. Hensler v. City of Glendale,* 8 Cal.4th 1 (1994), the state Supreme Court found that the 90-day limitations period provided for in the Subdivision Map Act is not unreasonable relying extensively on Coastal Act analysis:

> "Although the 90-day limitation period is short, it is, as was the 60-day review period of [Coastal Act] section 30801 at issue in *Ham,* the period 'operates less as a limitations period and more as a time limit for seeking review of the ruling of another tribunal. . . . [T]he Legislature had every reason to conclude that 60 days provides ample time for a property owner to decide whether to challenge an adverse Commission decision.' " (8 Cal.4th at 28, quoting *California Coastal Comm'n v. Superior Court (Ham), supra,* 210 Cal.App.3d at 1496-97.)

Furthermore, a variety of policy, planning and housing experts has stressed the need for prompt resolution of such land use controversies. (*See, e.g.,* Governor Pete Wilson's Council on Competitiveness, *California's Jobs and Future,* at p. 39 (1992) (the so-called "Ueberroth Commission").) As the Ueberroth Commission's final report put

it: "The legal system fails to resolve land-use disputes expeditiously. . . . [I]t becomes increasingly clear that the current judicial structure is unable to render consistent and *timely* decisions. . . . " (*Ibid.*, emphasis added.) In contrast, Petitioners argue that there should be no statute of limitations so that development permit decisions made *and* acted upon over a decade ago could be challenged by a third party. Again, this is not the law in California and all challenges to administrative permit decisions – even those based on constitutional principles – must be brought within the statutory limitations period.

B. The Doctrine of Waiver

With respect to the doctrine of waiver, and as noted above, the prior owners of the subject lots *voluntarily* recorded the Declarations of Restrictions on the subject lots in exchange for "valuable consideration." (*Ojavan Investors, supra*, at 5.) Further, the restrictions were signed by the prior landowners who, without qualification, declared that each "intends that this Declaration of Restrictions recombine and unify the Subject Lands" and that "[a]ny breach of this Declaration of Restrictions shall . . . render the [landowners] or their successors liable pursuant to the [Coastal Act]." (*Ibid.*) Thus, the state court also based it decision on the well-established common law doctrine of waiver as enunciated in the *Rossco Holdings* case: "A landowner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity, and accepting the benefits afforded by the permit." (*Rossco Holdings*,

supra, 212 Cal.App.3d at 654, citations omitted.) Or, as the Ninth Circuit put it:

> "[A] contractual promise which operates to restrict a property owner's use of land cannot result in a 'taking' because the promise is entered into voluntarily, in good faith and is supported by consideration. . . . To allow [the landowner] to challenge the settlement agreement five years after its execution, based on a subsequent change in the law, would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind." (*Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696, 698 (9th Cir. 1991).)

We note that Petitioners rely on *Morehart v. County of Santa Barbara*, 7 Cal.4th 725 (1994), to argue that California's Subdivision Map Act, Government Code sections 66410 *et seq.* ("SMA"), preempts the Coastal Commission's merger procedures. (Pet., at 18-20.) *Morehart* is irrelevant here. As the state court in *Ojavan Investors* held, the *Morehart* issue need not be reached "since we have concluded that the trial court properly sustained the Commission's demurrer on the basis of the statute of limitations and doctrine of waiver." (*Ojavan Investors, supra*, at 16.) The state court nonetheless distinguished *Morehart* by noting that the "petitioners in *Morehart* who applied for a coastal development permit did not obtain one because they did not agree to any merger of their parcels; instead they petitioned for a writ of mandate." (*Ibid.*) The state court continued:

> "In contrast, Thorne and Leanse were granted their permits and [Petitioners'] predecessors in

> interest agreed to the mergers. [Petitioners] purchased the unified parcels with notice of the recorded declarations of restrictions and cannot at this late date assert claims their predecessors could have presented but did not." (*Id.*, at 16-17.)

The state court in *Ojavan Investors* properly applied the doctrine of waiver to bar Petitioners' claims.[5]

C. The Law of Assignment

The state court, in holding that Petitioners' claims are barred by waiver as promulgated in the *Rossco Holdings* case, also held that under the state statutory law of assignment, such claims were likewise barred. (*Ojavan Investors, supra,* at 15.) The state court noted that since Petitioners' "predecessors in interest waived their right to

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[5] We further note that Petitioners mischaracterize the holding in *Morehart*. Petitioners contend that *Morehart* stands for the proposition that contiguous parcels of land may be merged by local agencies *only* in accordance with the authority and procedures prescribed by the SMA. (Pet., at p. 19.) This is not true. The California Supreme Court in *Morehart* held that section 66451.10 of the SMA "impliedly preempts zoning ordinances requiring for issuance of a development permit, the merger of parcels that would not have been eligible subjects of merger under the standards of that section." (7 Cal.4th at 764.) The Court "emphasize[d] the narrow scope of [the] holding" by limiting its decision to involuntary mergers initiated by local agencies under the merger provision of the SMA. (*Id.*, at 760.) In short, the authority of a state agency to initiate the voluntary merger of parcels as part of a TDC Program never was at issue in *Morehart*.

challenge the permit's TDC condition because they specifically agreed to and complied with the condition and accepted the benefits afforded by the permits and such predecessors in interest could not transfer or assign to [Petitioners] any legal rights greater than they themselves possess, [Petitioners] obtained the property in question with the same limitations and restrictions which bound their predecessors in interest." (*Ibid.*, citations omitted.)

In so holding, the state court explicitly relied on California Code of Civil Procedure section 368 which provides that "[i]n the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment. . . . " In applying California's statutory law of assignment, the state court explicitly rejected Petitioners' attempts to bootstrap a Fifth Amendment claim to the purely state law issue:

> "Although there must be a knowing, voluntary and intelligent waiver of a constitutional right, such as the Fifth Amendment right to be free from a taking of property without just compensation, it is not the Fifth Amendment right which appellants have waived. Rather, appellants have waived, by their purchase of deed-restricted lots, any right to a property interest greater than that conveyed by their predecessors in interest. As with the analogous situation of covenants which run with the land, appellants can take 'only the title [the prior owner] had and subject to prior recorded instruments.' " (*Ojavan Investors, supra,* at 15-16, citations omitted, quoting *Oceanside Community Ass'n v. Oceanside Land Co.*, 147 Cal.App.3d 166, 176 n. 7 (1983).)

Put another way, landowners such as Petitioners have no standing to allege a Fifth Amendment claim, as a matter of law, when the property is purchased with the restriction already in place:

> "A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury. The price paid for the property presumably reflected the market value of the property minus the interests taken. [The landowner] has no standing to assert facial claims based on the loss of the premium and the loss of the right to dispose of property." (*Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994).)

Since the subject lots "were essentially rendered valueless by the extinguishment of building rights,"[6] and since Petitioners "purchased the unified parcels with notice of the recorded declarations of restrictions,"[7] Petitioners have no standing in the first instance to "avail [themselves] of the Just Compensation Clause because [they have] suffered no injury." (*Carson Harbor Village, supra*, 37 F.3d at 476.)

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[6] *Ojavan Investors, supra*, at 12 n. 6. The state court also pointedly noted that Petitioners "do not challenge the restrictions which dedicated scenic easements and thus extinguished building rights on the lots." (*Ibid.*) The question of how Petitioners can get relief by only challenging the Declarations of Restrictions, but not the OTDs, has never been addressed by Petitioners.

[7] *Ojavan Investors, supra*, at 16-17.

The state court judgment, therefore, is supported by the adequate and independent state ground of the law of assignment.

II.

PETITIONERS WERE NOT DEPRIVED OF THEIR DUE PROCESS RIGHTS

Petitioners assert that, in "disregard of the Due Process Clause, [the *Ojavan Investors* decision] precludes landowners . . . from ever being able to defend on the merits claims of breach of covenants running with the land. . . . " (Pet., at 11.) This is false. The "merits" that Petitioners want to argue go to how the deed restrictions were originally adopted. A landowner who wants to raise this issue may do so if he or she files a timely petition for writ of mandate challenging the permit condition. Thereafter, there will be a trial on the merits. (*See* Code of Civ. Proc. § 1094.5.)

Petitioners also presuppose they were injured by the Coastal Commission. By their own admission, however, prior to purchasing the deed restricted lots, "Petitioners obtained and relied upon title profiles (rather than full title reports)" which allegedly did not disclose the restrictions. (Pet., at p. 7.) The Coastal Commission cannot be blamed for Petitioners' rash reliance on imperfect and incomplete title documents. Accordingly, even if their claims were not barred by limitations, waiver and assignment principles, Petitioners are "not entitled to recover self-induced damages. . . . " (*Dayton Time Lock Service, Inc. v. The Silent Watchman Corp.*, 52 Cal.App.3d 1, 10 (1975).)

In any event, Petitioners admit in their pleadings that the cease and desist hearing properly followed statutory guidelines. (CT-BS, at pp. 8, 115, 118-213.) Further, Petitioners appeared and made presentations at the cease and desist hearing through their counsel, Shelly D. McMillan, Esq., and through a corporate officer and admitted agent, Peter D. Bogart. (CT-BS, at pp. 1932-1942, 1957-1961.) Ms. McMillan and Mr. Bogart also heard oral testimony against their clients. (CT-BS, at pp. 1925-1970.) Never did they assert that the cease and desist hearing itself was improperly noticed or that they required more time to gather or present evidence to defend against the cease and desist recommendation. (CT-BS, at pp. 1932-1943, 1957-1961.) Moreover, Ms. McMillan and Mr. Bogart never requested a continuance of the hearing. (*Ibid.*) In short, Petitioners have never alleged that the cease and desist hearing was, in and of itself, improper. Accordingly, since Petitioners were accorded their due process rights, the state court properly applied the limitations and waiver principles announced in the *Rossco Holdings* case.

III.

SHELLEY V. KRAEMER HAS NO APPLICATION TO THIS CASE

Petitioners assert that "[u]nder the rule promulgated by the court below, this Court could never have decided the landmark case of *Shelley v. Kraemer*, 334 U.S. 1 (1948), because by the time the plaintiff sued claiming that the racially exclusive 34-year old covenants denied equal protection, the limitations period in which to do so,

would – under the reasoning of the court below – have long since run, barring the constitutional challenge." (Pet., at p. 13.) *Shelley v. Kraemer* is inapplicable to this case.

First, *Shelley v. Kraemer* struck down as violative of the Fourteenth Amendment's equal protection clause the state court's enforcement of restrictive covenants that had as their purpose the "exclusion of persons of designated race or color from ownership or occupancy of real property." (334 U.S. at 4.) Conversely, the Declarations of Restrictions in *Ojavan Investors* do not restrict *who*[8] may purchase but, rather, the *manner* by which the lots are to be sold. That is, the "77 former individual lots were recombined into 2 large lots . . . [such that] the . . . lots could not be sold off individually." (*Ojavan Investors, supra*, at 5-6.) Thus, Petitioners were absolutely within their rights to purchase one or both of the larger recombined lots but for investment purposes chose, instead, to purchase 49 of the former 77 individual lots in violation of the deed restrictions.

Second, as the state court in *Ojavan Investors* noted, the "TDC Program has been recognized as a well-established mechanism by which the Commission, as well as other local governments, attempts to balance a private property owner's ability to obtain development permits

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[8] The state court in *Ojavan Investors* noted that with respect to TDC Programs such as that used by the Coastal Commission, the governmental entity "is rightly indifferent as to who does the development. It lets the market decide the price." (*Ojavan Investors, supra*, at 3-4 n. 3, quoting *Barancik v. County of Marin*, 872 F.2d 834, 837 (9th Cir. 1988), *cert. denied*, 493 U.S. 894 (1989).)

with the state's interest in protecting natural resources from unbridled development." (*Ojavan Investors, supra,* at 3-4 n. 3.) In so holding, the *Ojavan Investors* court cited the Ninth Circuit decision of *Barancik v. County of Marin,* 872 F.2d 834 (9th Cir. 1988), *cert. denied,* 493 U.S. 894 (1989), where the court rejected a Fifth Amendment challenge to Marin County's TDC Program as being "rationally related to the overall purpose of preserving agriculture in the area." (*Ojavan Investors, supra,* at 3-4 n. 3.)

Third, Petitioners do not and cannot cite a single reported decision where a court struck down as unconstitutional, *ab initio,* a TDC Program such as that used by the Coastal Commission. Rather, the courts have either rejected as without merit constitutional challenges to such restrictions (*e.g., Barancik v. County of Marin, supra,* 872 F.2d 834), or alternatively have held that all constitutional challenges are barred when the limitations period has run and/or once the permit applicant accepts the terms of the permit thereby waiving any potential challenge (*Rossco Holdings, Inc. v. State of California, supra,* 212 Cal.App.3d 642). Thus, even if any particular TDC permit is voidable, it is not void at its inception as was the racially-restrictive covenant in *Shelley v. Kraemer* and, therefore, a constitutional challenge to a TDC permit could be barred by waiver, limitations and assignment principles.

Fourth and finally, Petitioners have never alleged that the Declarations of Restrictions violated their rights as a constitutionally protected class. (*See* Complaint at CT-BC, at pp. 1-25; Petitioners' Opening Brief filed at the

Court of Appeal, at p. 44.) The Declarations of Restrictions are neutral on their face and in their operation and, accordingly, cannot implicate the Fourteenth Amendment. Accordingly, *Shelley v. Kraemer* has no bearing on this case whatsoever.

CONCLUSION

The petition for writ of certiorari should be denied.

DATED: December 29, 1994

Respectfully submitted,

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APPENDIX A

California Public Resources Code section 30801 states: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action has become final."

APPENDIX B

California Code of Civil Procedure section 368 states: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity."

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No. 94-1013

In The

Supreme Court of the United States

October Term, 1994

OJAVAN INVESTORS, INC., et al.,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Two

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I

INTRODUCTION

Though the December 5, 1994 Petition presented the question of whether Petitioners were denied due process below, the Commission's Opposition gives this central question a cavalier dismissal (slightly over one page (Opp. 18-19)), *not condescending to cite a single opinion of this Court.*[1] Rather than confront the constitutional issue raised, the Commission offers an Opposition which is for the most part a paraphrase of the California court of

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[1] The entire Opposition focuses on state law; only two cases of this Court are so much as mentioned, one (*Shelley v. Kraemer*, 334 U.S. 1 (1948)) in an effort to distinguish it, the second (*Coleman v. Thompson*, 501 U.S. 722 (1991)) to state the general theory of adequate and independent state grounds.

The Opposition's focus on California law rather than the law of this Court comes as no surprise. As Petitioners pointed out at Pet. pp. 23-26, California has become an insular, self-contained entity in land use regulation law, characterized at all judicial levels by extreme deference to government and antipathy to individual rights in property. The Commission does not dispute this, nor could it: the fact is too widely known and the supporting evidence too strong to make denial credible. Since the Petition was filed, this phenomenon has manifest itself once again. At Pet. p. 26 n.23, Petitioners noted that at the time it decided *Dolan v. City of Tigard*, ___ U.S. ___, 120 L. Ed. 2d 304 (1994), this Court also ordered reconsideration of *Ehrlich v. Culver City*, 15 Cal. App. 4th 1737 (1993), in light of *Dolan*. On December 23, 1994, the California Court of Appeal for the Second Appellate District, Division Five issued its second *Ehrlich* opinion, and it is almost as if *Dolan* never happened: the court reissued its prior opinion with a few modifications to pay lip service to *Dolan*, again sustaining all the exactions Culver City imposed, including one requiring the property owners to spend tens of thousands of dollars to furnish art to the community.

appeal opinion, and (unfortunately but predictably) seeks refuge in state law under the "adequate and independent grounds" rubric. But the Commission's construct fails; the alleged state grounds it asserts are neither "adequate" nor "independent."

II

THE FEDERAL CONSTITUTIONAL RIGHTS ASSERTED BY PETITIONERS CANNOT BE FRUSTRATED BY STATE PROCEDURES

A. States Can Augment Federal Constitutional Rights Afforded Their Residents, But Cannot Diminish Or Deny Those Rights

As Justice Holmes put it in *Davis v. Wechsler*, 263 U.S. 22, 24 (1923), "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Justice Kennedy expressed the same thought in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798, 824 (1992), when he stated that if the just compensation clause is to be effective, "its enforcement must not be frustrated by a shifting background of state law." This rule is no more than an application of these governing principles:

(1) the Constitution of the United States is the "supreme law of the land" (U.S. Const. art. VI, cl. 2; Cal. Const. art. III, § 1);

(2) while it is permissible for the states to extend greater protections to residents than those required by the United States Constitution (*Cooper v. California*, 386 U.S. 58, 62 (1967); *People v. Brisendine*, 13 Cal. 3d 528,

549 (1975)) it is not permissible to shrink those protections; and

(3) what cannot be done directly because of constitutional proscriptions also cannot be done indirectly (*Macallen v. Massachusetts*, 279 U.S. 620, 629 (1929)).

The Commission attempts an end run around this bedrock law by arguing that this Court has no jurisdiction to consider the Petition because the decisions below are supported by adequate and independent state grounds. Not so.

B. The Doctrine of Adequate And Independent State Grounds Has No Application In This Case

The Commission urges time-bar, waiver and assignment as "adequate and independent state grounds" precluding this Court's intervention. But the *sine qua non* of the doctrine of adequate and independent state grounds is – in the words of the only Supreme Court case the Commission relies on in their entire opposition – that "if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). "A state ground is 'adequate' where the judgment would have to be upheld even if the federal ground were reversed; . . . . A state ground is 'independent' where its resolution is not tied to federal issues in the case." Laurence H. Tribe, *American Constitutional Law*, § 3-24 p. 163 (Foundation Press, 2d ed. 1988). But if this Court were to hold here, on Constitutional grounds, that by an improper application of limitations, waiver and assignment, the courts below denied

Petitioners due process (by preventing them from presenting any defense to the Commission's administrative prosecution or even having their substantive claims considered), the judgment would obviously have to be set aside and this case would be at issue again.

In support of its claim of adequate and independent grounds, the Commission makes no effort to explicate the law of this Court. After the fleeting introductory reference to *Coleman*, the Commission simply begs the question, and argues its version of California law. The reason for this diversion is clear; any attempt at coherent analysis of Federal "adequate and independent grounds" law would expose the fatal flaw in its position. Thus the Commission assumes, rather than proves, the linchpin of its argument.

The Commission attempts to buttress its position by urging, at Opp. p. 9, that Petitioners "never raised a constitutional attack" below. However, at Opp. p. 8, it quotes the Opinion below that the "heart of both . . . [the] petition and complaint are attacks on the Declarations of Restrictions on various *constitutional* and statutory grounds" (emphasis added), and at Opp. p. 16, states that "[i]n applying California's statutory law of assignment, the state court explicitly rejected Petitioners' attempts to bootstrap a Fifth Amendment claim to the purely state law issue."[2] The Commission seems in a bit of a quandary

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[2] At Opp. 9 n.3, the Commission correctly notes that the Petition identifies (solely to point out a strong probability of prevailing on the merits) seven state law issues, and that these were asserted below. But the Commission's suggestion that the resolution of the controversy below "is underscored" by the mention of these arguments is, with respect, disingenuous; *the*

as to what its position on this issue should be, and attempts to resolve it by arguing out of both sides of its mouth. In fact, the Commission is correct on pages 8 and 16, and incorrect on page 9. For example, the constitutional issues here presented were raised at pp. 3, 15, 21-15 of the petition for review to the California Supreme Court, which in itself is sufficient under the standard this Court prescribed in *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973).

III

THE COMMISSION'S RESPONSE TO PETITIONERS' AUTHORITIES AND ARGUMENTS (WHEN IT CHOOSES TO RESPOND) PRESENTS NO COMPELLING GROUNDS FOR DENYING CERTIORARI

The Commission consumes several pages of its Opposition with *ipse dixit* argument disputing the applicability of *Shelley v. Kraemer* to this case. (Opp. pp. 19-22) But the "distinctions" it makes are irrelevant to the point Petitioners argue. In *Shelley v. Kraemer*, this Court reached back to strike down 34 year old covenants because they were void *ab initio* (there because of restrictive covenants based on race). Similarly, in the case at bench, this Court is asked to reach back to 10 or 12 year old covenants, because they were void *ab initio* (for the reasons set forth at Petition p. 19-22). The point is that the passage of some

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preclusion bar was interposed and these issues went largely unconsidered. Petitioners were thus denied any opportunity to defend themselves against the Commission's charges.

kind of limitations period that might bar a facial challenge does not preclude a subsequent "as applied" challenge when a case or controversy ripens.[3]

Ignoring such concerns, the courts below held that Petitioners were obligated to bring an action – *an action challenging the right of parties who are strangers to this controversy to develop unrelated land* – when there was no reason to bring suit, and indeed when there was no right in anyone to bring an action for anything because there was no justiciable controversy. Indeed, at that time Petitioners had no interest in the lots, and the restrictions were not applied to them. But as this Court made clear in *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988), an abstract facial challenge mounted after an objectionable regulation is first enacted, is unripe until an actual controversy over the regulation's application is presented. Thus, the Commission would have it that Petitioners' challenge can only be premature under *Pennell* or tardy under the opinion below – *but never timely*. Thus it goes in California.[4]

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[3] This is the same point made in the factually indistinguishable case of *Orange & Rockland Utilities, Inc. v. Philwold Estates, Inc.*, 52 N.Y.2d 253, 259-61 (1981), explicated at Pet. pp. 17-18. The Commission ignored this case, venturing no opinion as to why the constitutional rights of Californians should be more constricted than those of New Yorkers.

[4] This illustrates the validity of a comment by a distinguished jurist that property owners in California are entitled to something better than "thinly disguised contempt" from the judiciary in land use cases. *Tahoe-Sierra Preservation Council, Inc. v. TRPA*, 911 F.2d 1331, 1346-47 (9th Cir. 1991) (Kozinski, J., dissenting), *cert. denied*, 499 U.S. 943 (1991).

One of the central factual issues in the underlying case is whether the lots were even legally merged. Petitioners demonstrated at Pet. pp. 19-22 that under California law they were not, and that no one treated them as merged. The Commission's response is simply to state categorically, with no address of particulars, that "the 77 former individual lots were recombined into two larger lots." Opp. p. 5. No mention is made of the fact that the County and other entities continued to treat them as individual lots for taxes and all other purposes. (The Commission's treatment of *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725 (1994), like its treatment of *Shelley v. Kraemer*, raises "distinctions" that make no legal difference whatsoever.)

Similarly, the Commission slides by the fact that the sale of the lots with the restrictions (whatever they were) attached posed no threat of development. And yet it was this sale by Petitioners that stirred the Commission to its heavy handed intervention – even though identical sales of the individual lots by the County itself apparently did not bother the Commission at all. Compounding the injustice further is the fact that California Public Resources Code § 30810, which the Commission identifies as the section that "delineated" its "permanent cease and desist power" (Opp. p. 7), did not become effective until January 1, 1992 – *after* the acquisition of the lots by Petitioners, and most of the challenged sales.

The Commission's defense of the draconian limitations period characteristic of California law (at Opp. pp.

10-13) is interesting, but largely beside the point.[5] The question presented here is not the wisdom of such periods. It is rather, can they be triggered retroactively without thereby violating Petitioners' due process rights.

IV

CONCLUSION

The Commission defends against a charge that California law violates the Constitution of the United States by relying, almost to the exclusion of all else, on . . . California law. It implicitly passes over as of no consequence the astonishing affronts to equity and logic reflected in this record. Like the courts below, it takes the position that Petitioners were required to do what this court in *Pennell* clearly said they could not do: pursue an action before it ripens or even becomes a case or controversy.

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[5] *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994), on which the Commission extensively relies, is the subject of a pending petition for certiorari in this court (No. 94-1124). And *Rossco Holdings, Inc. v. State of California*, 212 Cal. App. 3d 642 (1989), on which the Commission not only relies but chides Petitioners for not mentioning, is clearly inconsistent with the language of *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 306-37 (1987), directed to California courts, which flatly and explicitly rejected the underlying premise of *Rossco* that an aggrieved Californian must wait to recover compensation until it is first "finally determined" in a writ proceeding that the challenged regulation constitutes a taking of property. Once again, California goes it own way.

The Commission's ultimate argument is that Petitioners' rights were destroyed before they were acquired.

Certiorari is respectfully urged.

Dated: January 12, 1995

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No. 94-1013

In The

Supreme Court of the United States

October Term, 1994

OJAVAN INVESTORS, INC., ET AL.,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari
To The California Court Of Appeal
Second Appellate District, Division Two

BRIEF AMICUS CURIAE OF THE FIFTH AMENDMENT FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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6 pp

This brief amicus curiae of The Fifth Amendment Foundation in support of the Petition for Writ of Certiorari sought by Petitioners in this case is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of this brief has been granted by counsel for all parties.

INTEREST OF AMICUS CURIAE

The Fifth Amendment Foundation, a California nonprofit corporation, is dedicated to the protection of the rights of property owners and to the equitable implementation of development regulations consistent with the protections of the Fifth and Fourteenth Amendments to the United States Constitution. As stated in the Foundation's Bylaws, the purposes of the Foundation are "to educate the public on the role of the Fifth and Fourteenth Amendments to the Federal Constitution in protecting private property rights" and "to defend the rights of private property owners to a balanced and equitable implementation of existing or proposed development regulations consistent with the protections of the Fifth and Fourteenth Amendments."

As amicus curiae, The Fifth Amendment Foundation seeks to augment the argument in the Petition for Writ of Certiorari. The Fifth Amendment Foundation believes that its public policy perspective and collective experience in support of private property rights and their relationship to a healthy economic environment will provide an additional viewpoint with respect to the constitutional issues presented. This case addresses the most basic of rights related to property ownership – the right to access to the courts to review government restrictions on property. As a result, The Fifth Amendment Foundation believes it is in the best interest of all affected parties to have clear direction from this Honorable Court as to the appropriateness and legality of the California Courts' refusal to review certain local government actions.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The California Court of Appeal's recent decision in *Ojavan Investors, Inc. v. California Coastal Commission* represents a shocking denial of due process rights and misapplication of procedural requirements resulting in a rule of law which precludes judicial review of Coastal Commission actions and which is in direct conflict with previous decisions of this Honorable Court. For the reasons discussed below, we respectfully request that you grant the pending Petition for Writ of Certiorari in this matter.

The Court Of Appeal Has Eliminated The Opportunity For Judicial Review Of Certain Coastal Commission Actions.

The facts in *Ojavan* are undisputed. On August 20, 1992 the California Coastal Commission adopted findings and issued an enforcement order regarding the subject property. On October 13, 1992 Petitioner filed its petition for writ of mandate. Therefore, this action was brought within the short 60-day statute of limitations contained in the California Coastal Act. *See* California Public Resources Code § 30801. Yet despite its timely filing, the Court of Appeal has dismissed the entire action, on demurrer and without leave to amend, as a result of an alleged statute of limitations violation. The California Court of Appeal has held that because Petitioner failed to bring an action within 60 days of the issuance of the original Coastal Permits regarding the subject property, some dating back to 1979, Petitioner is barred forever from challenging any subsequent action by the Coastal Commission regarding the same property. According to the Court of Appeal, the August 1992 action of the Coastal Commission cannot be judicially challenged. That ruling conflicts directly with the clear statements of the Coastal Act itself, a plethora of California and federal

case law, and the Coastal Commission's own internal interpretations of the Coastal Act.

California Public Resources Code § 30801 states that "any aggrieved person shall have a right to judicial review of ***any decision or action*** of the Commission by filing a petition for writ of mandate in accordance with Section 1094.5 of the California Code of Civil Procedure, within 60 days after the decision or action has become final." (Emphasis added.) Here, Petitioner filed an action within 60 days after the Coastal Commission's August 1992 action. The Court of Appeal has found that somehow the Commission's August 1992 action is not a "decision or action" pursuant to Section 30801. Without explanation the Court of Appeal has decided to relate the 60 day statute of limitations back to the original permit action regarding the subject property and not to allow any challenge, even those brought within the 60 day statute of limitations, to any subsequent action of the Commission regarding the same property.

Clearly, Petitioner must be allowed the opportunity to challenge the Commission's August 1992 action. Even the Commission's own August 20, 1992 written order states that "any person or entity against whom this order is issued may file, pursuant to Section 30803(b) of the California Public Resources Code, a petition with the Superior Court for a stay of this order." Judicial review of the August 1992 action is clearly allowed and, even if Petitioner's pleadings stated an incorrect cause of action, amendment should be allowed to the timely-filed complaint so as not to bar Petitioner from any opportunity for judicial review.

Under the Court of Appeal's rationale, once 60 days had passed from the 1979 action, the California courts can never again be involved in the interpretation, review or enforcement of any Coastal Commission action regarding the subject property. Here, the Coastal Commission is taking action to enforce a 15-year old permit. In the course of enforcing that permit the Commission has taken

subsequent actions and made numerous interpretations of the terms and conditions of that permit. Not only does Petitioner have the right to have judicial review of the subsequent actions by the Commission regarding the subject property, but should issues arise requiring declaratory relief or judicial interpretation of the terms and conditions of the permit itself, or of documents generated as a result of the permit (i.e., the Declarations of Restrictions), Petitioner is entitled to such judicial review. According to the Court of Appeal, however, once 60 days have passed from an initial Coastal Commission action the Commission may do whatever it pleases for the rest of time regarding the subject property. Such a holding cannot stand.

The same analysis can be applied to the Court of Appeal's conclusion with regard to the Coastal Commission's waiver defense. Even if Petitioner's predecessors in interest agreed to the permit conditions, and as a result waived their rights to challenge those conditions, such a waiver cannot possibly apply to subsequent Commission actions or to the ability of a party to seek declaratory relief as to the interpretation and enforcement of the terms of the permit and later generated documents.

CONCLUSION

As this Honorable Court is well aware, the California Coastal Commission on numerous occasions has stepped across the bounds of statutory, common law and constitutional propriety. Now the Commission has somehow convinced the Court of Appeal to deny a property owner the right to challenge Commission actions, even within the 60-day statute of limitations, when such an action involves the subject property of an earlier unchallenged Commission action. The California Coastal Act itself is absolutely clear that "any decision or action" of the Coastal Commission may be challenged within 60 days. As a result, a subsequent enforcement action, and in particular one in which a hearing was held, findings were

made, and a Commission vote was taken, clearly falls within the "decision or action" language of California Public Resources Code Section 30801. The Court of Appeal's ruling in this case has denied Petitioner any opportunity for judicial review. On that basis alone a Writ of Certiorari should be granted and the Court of Appeal decision reversed.

To allow the Court of Appeal's published decision to stand would serve only to vastly expand the Coastal Commission's powers to take action outside the scope of any judicial review or remedy. Such a result is without basis in California or federal law. Property owners must have the right to challenge Coastal Commission actions whether they be initial actions on a permit application or subsequent actions to interpret or enforce the terms and conditions of previous approvals. The Coastal Commission has not proven itself worthy of protection from all judicial review nor does the law allow such an illogical result. The Fifth Amendment Foundation respectfully requests that this Court grant a Writ of Certiorari in this case.

DATED: January 13, 1995

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